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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910. 1913

No. 668. 61

PHŒNIX RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

LEE H. LANDIS, ADMINISTRATOR OF THE ESTATE OF GEORGE W. SANDERS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 20, 1911.

(22,809)

(22,809)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 388.

PHŒNIX RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

LEE H. LANDIS, ADMINISTRATOR OF THE ESTATE OF GEORGE W. SANDERS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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a In the Supreme Court of the United States.

No. —.

PHŒNIX RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Defendant in Error.

TRANSCRIPT OF RECORD.

Filed —— —, ——.

—— ——, *Clerk.*

Vol. 1.

1 In the Supreme Court of the Territory of Arizona.

No. 1114.

PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Appellee.

L. H. Chalmers, Esq., and H. B. Wilkinson, Esq., (of the law firm of Chalmers & Wilkinson); and Paul Burks, Esq., attorneys for Appellant.

J. M. Jamison, Esq.; and T. G. Norris, Esq., and Frank O. Smith, Esq., (of the law firm of Norris & Smith), attorneys for Appellee.

On Appeal from the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai.

Be it remembered that on to-wit: the sixteenth day of March, 1909, came the appellant in the above entitled cause, by its attorneys, and filed in the clerk's office of the Supreme Court of Arizona, in said entitled cause, a certain Judgment Roll in words and figures following, to-wit:

2 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

No. —.

CLARA S. SANDERS, Executrix of the Estate of Geo. Sanders, Deceased,
vs.
THE PHŒNIX RAILWAY COMPANY, a Corporation, Defendant.

The plaintiff, as administratrix of the estate of George W. Sanders, deceased, a citizen and resident of said county, complains of the defendant, The Phœnix Railway Company, a corporation organized

and doing business under the laws of said Territory, and for cause of complaint alleges:

I.

That on and about the 20th day of March, 1902, the defendant was the owner of and operating a certain electric street railway in and through the streets of the city of Phœnix, in said county, and in the country outside, for the carrying of passengers for hire.

II.

That on the date last aforesaid said deceased was a passenger on one of the cars of said defendant over a portion of its railway within said city of Phœnix to be safely transferred thereon by the defendant, and was then and there lawfully riding upon said defendant's
3 car, for which transportation said deceased had then and there paid to defendant its customary and required fare.

III.

That while said deceased was being so transported the defendant and its employee in charge of and operating said passenger car on which the deceased was riding, negligently, carelessly and unskilfully caused the same to be run into, upon and around a sharp curve in the track on which said car was running, at or near the corner of Adams street and Sherman avenue, in said city of Phœnix, at an unusual, high and dangerous rate of speed, by reason whereof said deceased, without fault or negligence on his part, and while in the exercise of due care, was violently thrown from said car to the ground, whereby he was greatly bruised, maimed and injured in his body and limbs and became sick, lame, sore and disordered, and so continued by reason aforesaid until the 6th day of February, 1904, when he died, and that such death was caused by reason of the injuries aforesaid.

IV.

That by reason aforesaid, of said injuries, and between said 20th March, 1902, and the 6th February, 1904, said deceased was unable to pursue his usual avocation except while suffering great bodily pain and distress and required the attendance of physicians and nurses during all of that time, and expended large sums in the em-
ployment of physicians and nurses, for medicines and in
4 traveling in the hope of being benefitted and in the hiring of persons to perform the labor he was employed to do, and during all of said time suffered great mental anguish and bodily pain because of the injuries aforesaid.

V.

That said deceased died intestate, leaving surviving him as sole heirs-at-law one son, Geo. E. Sanders, one daughter, Ida S. Osgood and his widow, the plaintiff.

VI.

And the said Clara S. Sanders brings into court here the letters of administration aforesaid, which give sufficient evidence to said court here of the grant of administration to said plaintiff.

Wherefore, plaintiff demands judgment against the defendant in the sum of $10,000 and for costs of suit.

J. M. JAMISON,
Plaintiff's Attorney.

(Endorsed: Filed March 18, 1904.)

Here follows the Summons, a copy of which is omitted by direction of attorney for Plaintiff in Error.

5 In the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

CLARA S. SANDERS as Executrix of the Estate of George W. Sanders, Deceased, Plaintiff,
against
THE PHOENIX RAILWAY COMPANY, a Corporation, Defendant.

Comes now the above named defendant the Phoenix Railway Company a corporation, by C. F. Ainsworth, its attorney, and for its answer to the complaint of the plaintiff herein,

First. Admits that the defendant the Phoenix Railway Company is a corporation organized under the laws of the Territory of Arizona, and was at the times mentioned in the complaint herein, operating a street railway in the City of Phoenix, Territory of Arizona.

This defendant further answering the complaint of the plaintiff herein, denies each and every other allegation in said complaint contained.

Wherefore this defendant prays the judgment of this court that the plaintiff's action herein be dismissed and that she take nothing by said action, and that it have and recover of and from the
6 said plaintiff, its costs and disbursements incurred herein.

C. F. AINSWORTH,
Defendant's Attorney.

(Endorsed: Filed Apl 7, 1904.)

In the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

No. 4269.

CLARA S. SANDERS, Administratrix of the Estate of Geo. W. Sanders, Deceased,
vs.
THE PHOENIX RAILWAY COMPANY, a Corporation.

Comes now the plaintiff, Clara S. Sanders, as administratrix of the estate of George W. Sanders, deceased, a citizen and resident of said

county, by leave of court first had and obtained amends her complaint heretofore filed herein, and for cause of her amended complaint alleges:

I.

That the defendant, Phœnix Railway Company, is a corporation organized and doing business under the laws of said Territory of Arizona, and was on and prior to the 20th day of March, 1902, owner of and operating a certain electric street railway in and through the streets of the city of Phœnix, in said county, and in the county outside of said city, for the carrying of passengers for hire.

7

II.

That on the date last aforesaid said deceased, who was then and there a passenger on one of the cars of said defendant over a portion of its railway within said city of Phœnix to be safely transferred thereon by defendant, and was then and there lawfully riding upon said defendant's car aforesaid, and for which transportation said deceased had then and there paid to the defendant its customary and required fare.

III.

That while said deceased was being so transported as aforesaid the defendant and its employee in charge of and operating said passenger car on which deceased was so riding, negligently, carelessly and unskillfully caused the same to be run into, upon and around a sharp curve in the track on which said car was running, at or near the corner of Adams street and Sherman avenue, in said city of Phœnix, at an unusual, high and dangerous rate of speed, by reason whereof said deceased, without fault or negligence on his part, and while in the exercise of due care, was violently thrown from said car to the ground, whereby he was greatly bruised, maimed and injured in his body and limbs and became sick, lame, sore and disordered, and so continued by reason aforesaid until the 6th day of February, 1904, when he died and such death was caused by reason *the* the injuries so received as aforesaid.

8

IV.

That said deceased left him surviving his widow, the plaintiff aforesaid, and George E. Sanders and Ida S. Osgood, son and daughter respectively and next of kin, who are still living, and that by reason of the premises aforesaid the plaintiff, as such administratrix, has sustained damage in the sum of five thousand dollars.

V.

And the said Clara S. Sanders brings into court here the letters of administration aforesaid, which give sufficient evidence to said court here of the grant of administration to said plaintiff.

Wherefore, plaintiff demands judgment against the defendant in the sum of Five Thousand Dollars, and for costs of suit.

J. M. JAMISON,
Plaintiff's Attorney.

(Endorsed: Filed Nov. 1, 1904.)

9 In the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai.

CLARA S. SANDERS, Administratrix of the Estate of George W. Sanders, Deceased, Plaintiff.
vs.
THE PHOENIX RAILWAY COMPANY, a Corporation, Defendant.

COUNTY OF MARICOPA, *ss:*

J. M. Jamison being first duly sworn says, that he is attorney of record for the plaintiff in the above entitled cause, as appears from the files and records therein, that said cause was instituted by the filing of complaint on the 18th March, 1904; that issue is joined and the same is ready for trial.

Deponent further shows, that upon the petition of George E. Sanders, an heir-at-law of said deceased, in the Probate Court of Maricopa county, where said estate is being administered, showing that said administratrix, Clara S. Sanders, had absented herself from said territory and neglected the proper administration of said estate for many months and had neglected to make her annual accounting and showing necessity for her removal and the appointment of another to take charge of said estate, *and* Lee H. Landis was, on the 7th day of December, 1905, duly appointed adminis-
10 trator of said estate, the said administratrix having been by the same order removed and her powers as administratrix revoked, and said Landis has since duly qualified and is now acting as such administrator.

Wherefore, affiant requests, on behalf of said Lee H. Landis, that an order be made herein substituting him, as such administrator, as plaintiff in said action in the place and stead of said Clara S. Sanders, administratrix, etc., and that said action may be continued and prosecuted in his name as such administrator.

J. M. JAMISON.

Subscribed and sworn to before me this 26th day of Oct., 1907.

[SEAL.] J. C. PHILLIPS,
Notary Public.

My Com. expires Jan. 19th, 1908.

11 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

CLARA S. SANDERS, Administratrix of the Estate of George W. Sanders, Deceased, Plaintiff,

vs.

THE PHŒNIX RAILWAY COMPANY, a Corporation, Defendant.

On reading and filing the affidavit of J. M. Jamison showing the disqualification of Clara S. Sanders to act as administratrix of the estate of said deceased, the plaintiff in the above entitled cause, and the granting of letters of administration to Lee H. Landis by the Probate Court of Maricopa county, where the probate of said estate is pending, and on motion of J. M. Jamison the plaintiff's attorney:

It is ordered that this action be and the same is hereby revived and continued in the name of said Lee H. Landis, as administrator of the estate of George W. Sanders, deceased, as plaintiff; that such administrator be and he is hereby substituted as plaintiff in the place and stead of said Clara S. Sanders, administratrix, etc., disqualified, and that such revivor and continuance be without prejudice to any of the proceedings already had in this action.

Dated Nov. 4th, 1907.

——— ———, *Judge.*

(Endorsed Filed Nov. 4th, 1907.)

12 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

CLARA S. SANDERS, Administratrix of the Estate of George W. Sanders, Deceased, Plaintiff,

vs.

THE PHŒNIX RAILWAY COMPANY, a Corporation, Defendant.

It has been stipulated between Clara S. Sanders and Lee H. Landis, now administrator of said estate, that upon the furnishing a bond of indemnity to said estate against further liability to said estate on account of the further prosecution of said suit, that his, said Landis', name should be substituted, as administrator, as plaintiff in said cause and be further prosecuted in his name as said Clara S. Sanders and her attorney, J. M. Jamison, who is plaintiff's attorney, shall determine.

This instrument is to advise the court that a sufficient and satisfactory bond has been furnished by said Clara S. Sanders under said stipulation, and that the name of said Lee H. Landis, as administrator of said estate, may, by an order of the court, be substituted in the place of said Clara S. Sanders as plaintiff and the case revived and thereafter prosecuted in his name as such administrator.

Phœnix, Oct. 26, 1907.

13 LEE H. LANDIS,
Administrator of said Estate.
By GEORGE D. CHRISTY,
Att'y for said Administrator and Estate.
J. M. JAMISON,
Plaintiff's Attorney.

(Endorsed. Filed Nov. 4, 1907.)

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Plaintiff,

vs.

THE PHOENIX RAILWAY COMPANY, a Corporation, Defendant.

Answer to Amended Complaint.

Comes now the defendant above-named and for answer to plaintiff's amended-complaint on file herein, by way of demurrer, says:

1. That it appears upon the face of said amended complaint that the alleged cause of action therein attempted to be pleaded is barred by the statute of limitations.

2. That said amended-complaint fails to state facts sufficient to constitute a cause of action against this defendant.

Wherefore defendant, having fully answered, prays to be hence dismissed with its costs.

C. F. AINSWORTH,
PAUL BURKS,
Attorneys for Defendant.

Denials.

Comes now the Defendant and for another, further and separate defense herein and for further answer to the plaintiff's amended-complaint herein, by way of answer, says

First. That this defendant was not at any of the times mentioned in said amended-complaint or at any other time or times guilty of any negligence, carelessness or improper conduct towards George W. Sanders, deceased, but that the injuries sustained by said deceased as in said amended-complaint described, if any there were, resulted from and were caused by the negligence, carelessness and improper conduct of said deceased and were not caused by and did not result from any negligent act or omission on the part of defendant or any of its agents, servants or employees.

Second. That this defendant denies generally and specifically each and every allegation in said amended-complaint contained.

Wherefore, defendant, having fully answered, prays to be hence dismissed with its costs and disbursements herein expended or incurred.

C. F. AINSWORTH,
PAUL BURKS,
Attorneys for Defendant.

(Endorsed: Filed Dec. 10, 1907.)

No. 4610.

LEE H. LANDIS, Administrator Estate of Geo. W. Sanders, Dec'd,
vs.
PHŒNIX RAILWAY COMPANY.

We the jury find the issues in favor of the plaintiff and assess the damages at $5,000.00.

DENNIS A. BURKE,
Foreman.

Filed May 26th, 1908 at 5 o'clock P. M.
J. M. WATTS, *Clerk.*

16 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Plaintiff,
v.
PHŒNIX RAILWAY COMPANY, Defendant.

Judgment.

This cause came on regularly to be heard on the 22nd day of May, 1908, Plaintiff appearing by J. M. Jamison, Esquire, and Messrs. Norris & Ross, his attorneys, Defendant appearing by Messrs. C. F. Ainsworth and Paul Burks, its attorneys, both parties announced ready for trial. A jury trial having been demanded by Plaintiff a jury was impaneled, chosen and sworn to try the issues herein.

Thereupon the Plaintiff offered evidence both oral and documentary to sustain the issues on his part, and rested. The Defendant then offered evidence both oral and documentary to sustain the issues on its part, and rested. The cause was argued to the jury by the respective counsel for Plaintiff and Defendant. The jury was then duly instructed by the Court concerning the law applicable to the cause and retired to consider its verdict.

On the 26th day of May, 1908, the jury having agreed upon a verdict were conducted into court by the officer having the jury
17 in charge, their names were called by the Clerk, and in open court they delivered to the Clerk their verdict in said cause, which was and is in writing, and signed by the foreman of said jury, a true and correct copy of which verdict is as follows:

We the jury find the issues in favor of the Plaintiff and assess the damages at $5,000.00.

DENNIS A. BURKE,
Foreman.

The Court thereupon read said verdict aloud, and the court inquired of the jury if such was their verdict, and all of the members of the jury agreed that it was. Whereupon the jury was discharged.

Now therefore, the Court having fully considered the pleadings herein, the nature of the case proved and said verdict, and being fully advised in the premises, concludes as a matter of law that the Defendant, Phoenix Railway Company, is indebted to Plaintiff Lee H. Landis as Administrator of the estate of George W. Sanders, deceased, in the sum of Five Thousand Dollars ($5,000.00), and that Plaintiff should have his costs herein expended.

Now therefore, it is ordered, adjudged and decreed that said Plaintiff do have and recover of and from said Defendant the sum of Five Thousand Dollars ($5,000.00), together with his costs of said suit herein taxed at —— Dollars ($——), and that he have
18 execution therefor.

Done in open court this 26th day of May, 1908.

RICHARD E. SLOAN, *Judge*.

(Endorsed: Filed Jun- 5, 1908.)

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

No. C1610.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Plaintiff,

vs.

THE PHOENIX RAILWAY COMPANY, a Corporation, Defendant.

Certificate Judgment Roll.

TERRITORY OF ARIZONA,
County of Yavapai, ss.

I, J. M. Watts, Clerk of the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai, do hereby certify the above and foregoing to be a full, true and complete copy of the judgment entered in the above entitled cause, as recorded in Judgment Book No. 9 of said Court, at page 246, and

I further certify that the foregoing papers, hereto attached,
19 do constitute the Judgment Roll in said action.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 6th day of June, A. D. 1908.

[SEAL.]

J. M. WATTS,
Clerk District Court,
By SARA W. TREGO, *Deputy*.

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

No. 4610.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Plaintiff,

vs.

THE PHŒNIX RAILWAY COMPANY, a Corporation, Defendant.

Motion for New Trial.

Comes now the defendant above named, by its attorneys, and moves the Court:

First. To vacate and set aside the verdict rendered in the above cause on the 26th day of May, 1908; and

Second. To grant the defendant a new trial of this cause.

This motion is made and based upon the grounds following:

I.

That the Court erred in overruling defendant's demurrer to plaintiff's amended complaint on file herein.

II.

That the Court erred in admitting evidence offered by plaintiff on the trial of this cause and formally objected to by the defendant.

III.

That the Court erred in rejecting evidence offered by the defendant and objected to by plaintiff.

IV.

That the Court erred in charging the jury and refusing to give instructions requested by the defendant and in giving instructions requested by plaintiff.

V.

That the verdict rendered, given and entered herein on May 26, 1908, awarding plaintiff damages in the sum of Five Thousand ($5000.00) Dollars, is contrary to law.

VI.

That the verdict rendered, given and entered herein on May 26, 1908, awarding plaintiff damages in the sum of Five Thousand ($5000.00) Dollars, is contrary to and is not sustained by the evidence introduced upon the trial of the above cause.

21

VII.

That the verdict rendered, given and entered herein on the 26 day of May, 1908, awarding plaintiff damages in the sum of Five Thousand ($5000.00) Dollars, is contrary both to the law and the evidence and is not supported thereby.

VIII.

That the verdict of the jury rendered, given and entered herein finding the issues in favor of the plaintiff and fixing the damages in the sum of Five Thousand ($5000.00) Dollars is excessive in that there was no evidence introduced showing or tending to show that the Estate of George W. Sanders, deceased, has been damaged in the sum of Five Thousand ($5000.00) Dollars, or in any other sum or at all.

IX.

That the verdict rendered, given and entered herein was rendered and given under the influence of passion and prejudice and is manifestly a perverse disregard of justice.

Dated at Prescott, Arizona, this 29th day of May, 1908.

C. F. AINSWORTH,
PAUL BURKS,
Attorneys for Defendant.

Service of a Copy of the foregoing Motion for a New Trial and Notice thereof is admitted this 29th day of May, 1908.

J. M. JAMISON,
NORRIS & ROSS,
Attorneys for Plaintiff.

(Endorsed: Filed May 9, 1908.)

22 In the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai.

No. 4610.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Plaintiff,
vs.
THE PHOENIX RAILWAY COMPANY, a Corporation, Defendant.

Supersedeas Bond.

Know all men by these presents: That the Phoenix Railway Company, a corporation, as principal, and The United States Fidelity and Trust Company, a corporation, as surety, are held and firmly bound unto Lee H. Landis, as Administrator, plaintiff in the above entitled action, in the penal sum of Ten Thousand Six Hundred Dollars

($10,600.00), lawful money of the United States, for the payment of which well and truly to be made the undersigned firmly bind themselves, their successors and assigns, jointly and severally by these presents.

The condition of the foregoing obligation is such that—

Whereas, the above named obligee obtained in the above entitled action in the above named court on the 26th. day of May, 1908, a judgment against the Phœnix Railway Company, defendant
23 above named and the obligor named herein as principal, wherein and whereby it was ordered, adjudged and decreed that the said Lee H. Landis, as Administrator of the Estate of George W. Sanders, deceased, should have and recover of and from said The Phœnix Railway Company the sum of Five Thousand Dollars ($5000.00), together with the costs in a sum not to exceed Two Hundred, Eighty-five and 10/100 Dollars ($285.10), and

Whereas the defendant thereafter filed its motion for a new trial, which was, on the 21st day of November, 1908, overruled, whereupon said defendant on said 21st day of November, 1908, gave notice in open court of an appeal to the Supreme Court of the Territory of Arizona from said Judgment and from said order denying said motion for a new trial and is desirous of staying and suspending the execution of said judgment until its said appeal shall have been perfected, heard and determined;

Now, therefore, if the said The Phœnix Railway Company shall prosecute its said appeal with effect, and in case the judgment of the appellate court shall be against it, shall perform its judgment, sentence or decree and pay all such damages as may be awarded against it upon the appeal, then this obligation to be void; otherwise to remain in full force, effect and virtue.

Dated this 17th day of December, A. D., 1908.

THE PHŒNIX RAILWAY COMPANY,
By PAUL BURKS, *Its Attorney, Principal.*

24 [SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By L. B. LARIMER AND JOHN M. ROSS,
Its Attorneys in Fact, Surety.

The foregoing bond is hereby approved this 17th day of December, A. D., 1908.

J. M. WATTS,
Clerk of the District Court.

Endorsed: Filed at 10 o'clock A. M. Dec. 17th, 1908. J. M. Watts, Clerk.

TERRITORY OF ARIZONA,
County of Yavapai, ss.

I, J. M. Watts, Clerk of the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai, do hereby certify and attest the foregoing to be a full, true

and correct copy of the Super-sedeas Bond in case 4610, Lee H. Landis, as Administrator of the Estate of Geo. W. Sanders vs. Phoenix Railway Company, as the same appears on file and of record in my office, and I have carefully compared the same with the originals.

In witness whereof, I have hereunto set my hand and annexed the seal of the said District Court at Prescott, this 11th day of March, A. D. 1909.

[SEAL.] J. M. WATTS, *Clerk*.

25 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

No. 4610.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Plaintiff,

vs.

THE PHOENIX RAILWAY COMPANY, a Corporation, Defendant.

Appeal Bond.

KNOW all men by these presents: That whereas the plaintiff in the above entitled cause did at the regular May A. D. 1908 Term of the above named Court, on the 26th day of May, 1908, recover a judgment in the above entitled cause against the defendant herein for Five Thousand Dollars ($5000.00), together with the costs, and

Whereas said Court did thereafter, at the regular November, A. D. 1908, Term of said Court, on the 21st day of November, 1908, overrule a motion for a new trial theretofore made by defendant and duly continued until said day, whereupon said defendant in open court gave notice of appeal to the Supreme Court of the Terri-

26 tory of Arizona from said judgment and from said order denying defendant's motion for a new trial and from the whole thereof;

Now, therefore, we the undersigned, The Phoenix Railway Company, a corporation, as principal, and The United States Fidelity and Guaranty Company, a corporation, as surety, hereby acknowledge ourselves, jointly and severally, bound to pay to plaintiff above named the sum of One Thousand Dollars ($1000.00), said sum being double the probable amount of costs of suit both in the appellate court and in the court below as fixed by the Clerk of the above named District Court.

The condition of the foregoing obligation is such that if the appellant and defendant above named shall prosecute its appeal with effect and shall pay all costs which have accrued in the court below or which may accrue in the appellate court, then this obligation shall be void; otherwise it shall remain in full force, effect and virtue.

In witness whereof, the undersigned have executed this appeal bond this 17th day of December, A. D. 1908.

THE PHŒNIX RAILWAY COMPANY,
(Signed) By PAUL BURKS, *Its Attorney.*
Principal.

THE UNITED STATES FIDELITY AND
27 GUARANTY COMPANY,
(Signed) By L. B. LARIMER AND
(Signed) JOHN M. ROSS, *Its Attorneys in Fact,*
[SEAL.] *Surety.*

I have fixed the probable amount of costs in this action both in the appellate court and in the court below at Five Hundred Dollars ($500.00), and have approved the foregoing bond this 17th day of December, A. D. 1908.

(Signed) J. M. WATTS,
Clerk of the District Court.

(Endorsed: Filed December 17, 1908.)

TERRITORY OF ARIZONA,
County of Yavapai, ss:

I, J. M. Watts, Clerk of the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai, do hereby certify and attest the foregoing to be a full, true and correct copy of the Bond on Appeal in Case 4610, Lee H. Landis, as Administrator Est. of Geo. W. Sanders vs. Phœnix Railway Company, as the same appears on file and of record in my office, and I have carefully compared the same with the originals.

In witness whereof, I have hereunto set my hand and annexed the seal of the said District Court at Prescott, this 11th day of March, A. D. 1909.

[SEAL.] J. M. WATTS, *Clerk.*

Minute Entries.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

Be it remembered that heretofore and on to-wit, the 4th day of April, 1904, the same being one of the juridical days of the April Term, A. D. 1904, of said Court, the following Order, inter alia, was had and entered of record in said Court, which said Order is in words and figures as follows, to-wit:

4269.

CLARA S. SANDERS, Ex'r'x,
vs.
PHŒNIX RY. CO.

At this day comes the said plaintiff and on the call of the Calendar demands a jury for the trial of this case.

28 And afterwards and upon to-wit, the 30th day of June, 1904, the same being one of the regular juridical days of the April Term, A. D. 1904, of said Court, the following Order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4269.

CLARA S. SANDERS, Adm'r'x,
vs.
PHŒNIX RAILWAY COMPANY.

At this day on motion of plaintiff's attorney, defendant by its attorney being present in court, it is ordered that the word Executrix wherever it appears in the pleadings and record herein be and by the Clerk — changed to Administratrix.

And afterwards and upon to-wit, the 3d day of October, the same being one of the regular juridical days of the October Term, A. D. 1904, of said Court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4269.

CLARA S. SANDERS, Adm'r'x,
vs.
PHŒNIX RAILWAY CO.

At this day, by consent, it is ordered by the Court, that this cause be set for trial October 20th, instant.

And afterwards and upon to-wit, the 25th day of October, 1904, the same being one of the regular juridical days of the October Term, A. D. 1904, of said Court, the following order was had and entered of record in said court in said cause, which said order
29 is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day come the respective parties hereto and by their respective attorneys.

And the empaneling of a jury herein for the trial of the issues herein joined is begun, and the hour for noon recess having arrived and there being 20 jurors in the jury box a recess is taken until 1:30 P. M. today, and the said jurors, after being duly admonished by the Court, that it is their duty not to converse among themselves nor with any one else on any subject connected with the trial, or to form or express any opinion thereon, are permitted to separate to meet the Court at 1:30 P. M. today.

And afterwards and upon to-wit, the same day the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day, on motion of the plaintiff, it is ordered by the Court that the appearance of W. H. Locke, Esq., an attorney duly admitted to practice law in the State of Ohio, be entered as associate counsel of plaintiff herein.

And afterwards and upon to-wit, the same day, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

30 (Title of Court and Cause, No. 4269.)

At this day, by consent of the respective parties, it is ordered by the Court that the examination of the jurors be now proceeded with, the absence of the juror A. H. Wormell notwithstanding.

And afterwards and upon to-wit, the same day, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day come again the respective parties hereto, and by their respective attorneys, and the said juror A. H. Wormell having come into the court-room and said 20 jurors being present in the jury box, the examination of said jurors is concluded, and the respective parties having exercised each their peremptory challenges, thereupon comes a jury for the trial of the cause, as follows, to-wit:

David Goldberg	J. M. Burris
W. M. Dameron	E. H. Spain
Edward Farley	J. I. Coffin
H. G. Feekins	A. H. Wormell
David Crismon	Albert Miller
William Widmer	T. J. Hill

twelve good and lawful men, and they are duly selected and tried, empaneled and sworn to well and truly try the matter at issue herein

between Clara S. Sanders, Adm'r'x, as plaintiff, and Phœnix Railway Co. and a true verdict give according to the law and the evidence.

And thereupon the defendant objects to the introduction of any evidence on the part of the plaintiff, which objection is sus-
31 tained by the Court, and plaintiff asks leave of the Court and is granted 10 days in which to amend the complaint herein, and thereupon the case is withdrawn from the consideration of the jury, to which the defendant excepts.

And afterwards and upon to-wit, the 25th day of February, 1905, the same being one of the regular *judicial* days of the October Term, A. D. 1904, of said Court, the following order was had and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day this matter coming on to be heard on motion of plaintiff to allow depositions heretofore taken to be read in evidence, is argued by counsel and submitted to the Court for consideration.

And afterwards and upon to-wit, the 4th day of March, 1905, the same being one of the regular juridical days of the October Term, A. D. 1904, of said Court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

The motion of the plaintiff that an Order be made herein allowing the depositions heretofore taken before amendment of the complaint to stand and be read in evidence upon the trial of said cause, viz: the depositions of George E. Sanders, Joseph C. McKee,
32 Ed S. Turner, Frank De Massey, Dan McNeil, Charles Kinsley, E. L. Gibson, and R. S. Slusher, coming on regularly to be heard, both parties to said suit being represented at such hearing by their respective attorneys, and the Court being fully advised, it is

Ordered, that said depositions so taken as aforesaid stand and be read in evidence upon the trial of said cause, subject, however, to the statutory right of the defendant, to make such objection to the form thereof or the manner of taking the same as it may be advised.

(Signed) EDWARD KENT, *Judge*.

And afterwards and upon to-wit, the same day, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day comes the defendant by C. F. Ainsworth, Esq., its attorney, and excepts to the order made herein allowing depositions to be read in evidence.

And afterwards and upon to-wit, the 3rd day of April, 1905, the same being one of the regular juridical days of the April Term, A. D. 1905, of said Court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

33 At this day it is ordered by the Court that this cause be set for trial May 15th proximo.

And afterwards and upon to-wit, the 15th day of May, 1905, the same being one of the regular juridical days of the April Term, A. D. 1905, of said Court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day it is ordered by the Court that the order heretofore made herein setting this cause for trial be vacated.

And afterwards and upon to-wit, the same day, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day by consent it is ordered by the Court that this cause be continued for the term.

And afterwards and upon to-wit, the 16th day of October, 1905, the same being one of the regular juridical days of the October Term, A. D. 1905, of said Court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

34 At this day on motion of defendant it is ordered by the Court that this cause be and the same is hereby dismissed for want of prosecution.

And afterwards and upon the same day, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day, on motion of plaintiff, defendant not objecting, it is ordered by the Court that the order of dismissal of this day in this cause be and the same is hereby vacated and the same be reinstated.

And afterwards and upon to-wit, the same day, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day, by consent, it is ordered by the Court, that this cause be set for trial November 28th proximo.

And afterwards and upon to-wit, the 28th day of November, 1905, the same being one of the regular juridical days of the October Term, A. D. 1905, of said Court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day by consent it is ordered by the Court that this cause be reset for trial December 15th, proximo.

35 And afterwards and upon to-wit, the 15th day of December, 1905, the same being one of the regular juridical days of the October Term, A. D. 1905, of said Court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day it is ordered by the court that the trial order herein be and the same is hereby vacated, to which ruling of the Court, the defendant by its counsel duly excepts.

And afterwards and upon to-wit, the same day, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day it is ordered by the Court that this cause be and the same is hereby continued for the Term.

And afterwards and upon to-wit, the 16th day of April, 1906, the same being one of the regular juridical days of the April Term, A. D. 1906, of said Court, the following order was had and entered of record in said Court in said cause which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day it is ordered by the Court that this cause be set for trial May 14th, proximo.

36 And afterwards and upon to-wit, the 9th day of May, 1906, the same being one of the regular juridical days of the April Term, A. D. 1906, of said Court, the following order was had and entered of record in said Court in said cause which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day upon the application of the plaintiff it is ordered by the Court that this cause be continued for the term, to which order of the Court the defendant by its counsel did then and there duly except.

And afterwards and upon to-wit, the same day, the following order, inter alia, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit

(Title of Court and Cause, No. 4269.)

At this day it is ordered by the Court that the trial order herein be and the same is hereby vacated.

And afterwards and upon to-wit, the 15th day of October, 1906, the same being one of the regular juridical days of the October Term, A. D. 1906, of said Court, the following order was had and entered of record in said Court in said cause which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day it is ordered by the Court that this cause be passed for later setting.

37 And afterwards and upon to-wit, the 15th day of April, 1907, the same being one of the regular juridical days of the April Term, A. D. 1907, of said Court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day by consent, it is ordered by the Court that this cause be passed temporarily.

And afterwards and upon to-wit, the 27th day of April, 1907, the same being one of the regular juridical days of the April Term, A. D. 1907, of said Court, the following order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4269.)

At this day comes the said plaintiff by J. M. Jamison, Esq., her attorney, and the said defendant by C. F. Ainsworth, Esq., its attorney, also comes, and thereupon this cause coming on to be heard upon the motion of the said defendant for a change of venue herein, the said motion is granted; and the counsel for the respective parties not agreeing upon the county to which this cause shall be sent.

It is thereupon ordered by the Court that this cause be sent to the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai, for trial or other disposition in said Court, upon the payment of the Clerk's costs for
38 a transcript and the filing and approval within Five Days of a bond for costs with sureties to be approved by the Clerk.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

I, Elias F. Dunlevy, Clerk of the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, do hereby certify that the above and foregoing is a full, perfect and complete transcript of the proceedings in the above entitled cause in said court.

And I further certify that the accompanying papers numbered from 1 to 22, both inclusive, are all the original papers in said case filed in my office.

Witness my hand and seal of said Court this 10th day of May, 1907.

[SEAL.] (Signed) ELIAS F. DUNLEVY, *Clerk.*

Minute Entries of the Clerk of the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

Be it remembered that heretofore and on, to-wit: the 4th day of November, A. D. 1907, the same being one of the regular juridical days of the November Term, 1907, of said court, the following proceedings, inter alia, were had and entered of record in said court, which said proceedings are in words and figures as follows, to-wit:

39 (Title of Court and Cause, No. 4610.)

Comes now the plaintiff by her counsel, J. M. Jamison and Norris & Ross, and the defendant by counsel, C. F. Ainsworth also comes. Upon proper showing made and upon motion of plaintiff, it is ordered that the name of Lee H. Landis, as administrator of the estate of George W. Sanders, deceased, be substituted as party plaintiff herein, to which order and ruling defendant excepts.

And afterwards and upon, to-wit: the 13th day of December, A. D. 1907, the same being one of the regular juridical days of the

November Term, 1907, of said Court, the following order, inter alia, was had and entered of record in said court, which order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4610.)

This cause coming on to be heard upon the demurrer on file herein J. M. Jamison, Esq., appearing for plaintiff, and Paul Burks, Esq., appearing for the defendant, on motion of J. M. Jamison, Esq., for plaintiff, it was ordered that the name of Norris & Ross be entered of record as of counsel for plaintiff. The demurrer was partially argued by counsel and, by agreement, it was ordered that defendant have ten days in which to file brief on demurrer, and plaintiffs have fifteen days in which to file reply brief, and, upon the filing of plaintiff's reply brief demurrer will be submitted without further
40 order. And it was further ordered by consent of the parties that this case be continued for the term.

And afterwards and upon, to-wit: the 15th day of February, A. D. 1908, the same being one of the regular juridical days of the November, 1907, term of said court, the following order, inter alia, was had and entered of record in said court, which order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4610.)

Defendant's demurrer, having been heretofore heard and submitted, is by the court overruled.

And afterwards and upon, to-wit: the 5th day of May, A. D. 1908, the same being one of the regular juridical days of the May Term, 1908, of said court, the following order, inter alia, was had and entered of record in said court, which order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4610.)

Comes now Norris & Ross, for plaintiff, and requests that a jury be had in the trial of this cause. Case set for trial 5, 21, '08.

And afterwards and upon, to-wit: the 22nd day of May, A. D. 1908, the same being one of the regular juridical days of the May Term, 1908, of said court, the following order, inter alia, was had and entered of record in said court, which order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4610.)

41 This cause came on to be heard upon the motion and affidavit to suppress, for want of service, etc., the deposition of Clara Sanders, J. M. Jamison, Esq., and Norris & Ross, appearing for

plaintiff, and C. F. Ainsworth and Paul Burks, Esquires, appearing for the defendant, and the court, having heard the argument of counsel, sustains the motion. The motion to suppress the depositions of J. W. Foss, O. E. Plath, E. P. Palmer, and W. T. Barr, Frank De Massey, E. S. Turner, Dr. R. S. Slusher, William H. Ward, Joseph C. McKee, E. L. Gibson and Charles Kinsley, coming on to be heard, was, by the court, denied.

This cause being called for trial, and a jury being demanded, at the discretion of the court the following jury was duly drawn, selected, accepted, empaneled and sworn to try the case, to-wit:

W. G. Greenwood,	D. A. Burke,
M. L. Earnhart,	George Wood,
W. I. Johnson,	A. C. Burmister,
Charles Keeler,	Henry Brinkmeyer,
E. H. Coughran,	J. W. Koontz,
Harry Hollingshead,	C. L. Gillett,

and further proceedings on trial of cause continued to 9 o'clock A. M., May 23rd, 1908, to which time the jury was excused under the usual instructions and admonitions of the court.

And afterwards and upon, to-wit: the 23rd day of May, A. D. 1908, the same being one of the regular juridical days of the May Term, 1908, of said Court, the following proceedings, inter
42 alia, were had and entered of record in said court, which said proceedings are in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4610.)

The trial of this cause having been continued to this day, comes now the plaintiff by J. M. Jamison and Norris & Ross, his counsel, the defendant by counsel, C. F. Ainsworth and Paul Burks, Esqs. The jury being in the box were called by the Clerk and all answered, and further proceedings on trial of cause were resumed. Counsel for plaintiff read to the jury plaintiff's amended complaint and stated case, and defendant's counsel read amended answer to the jury and stated defense. Plaintiff, to sustain the issues on his part, offered documentary evidence, to-wit: certified copies of letters of administration, etc., which were admitted. Depositions of E. S. Turner and Joseph C. McKee were offered and admitted for plaintiff. Witness George B. Upton was sworn and testified for plaintiff. Deposition of George B. Sanders was offered and admitted and witness J. M. Jamison was sworn and testified on behalf of plaintiff, and further proceedings on trial continued till Monday, May 25, 1908, at 9:30 o'clock A. M., to which time the jury was dismissed under the usual instructions and admonitions of the court.

And afterwards and upon, to-wit, the 25th day of May, A. D. 1908, the same being one of the regular juridical days of the
43 May Term, 1908, of said Court, the following proceedings, inter alia, were had and entered of record in said court, which said proceedings are in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4610.)

The trial of this cause having been continued till this day, the plaintiff appeared in court by counsel, J. M. Jamison and Norris & Ross, the defendant appearing by counsel C. F. Ainsworth and Paul Burks, and, the jury being in the box and all answering the call by the Clerk, further proceedings on trial of cause were resumed. The plaintiff offer depositions of Drs. Foss, Plath, Palmer and W. T. Barr, which were admitted under objections by the defendant, defendant waiving the ruling of the court upon certain objections to parts of the evidence offered in depositions, to be made by the court hereafter, thereupon the plaintiff rested for the present. Defendant, by counsel, stated defense to the jury, and documentary evidence was offered by defendant and admitted, to-wit: certified copy of affidavits of defendant filed in pension claim. Witnesses Dr. W. M. Dutfield, Dr. Henry T. Brainard, James F. Burns and Dr. J. W. Flinn were sworn and testified on behalf of defendant, and further hearing continued to 9 o'clock A. M., May 26, 1908, to which time the jury was excused under the usual admonitions and instructions of the court.

44 And afterwards and upon, to-wit: the 26th day of May, A. D. 1908, the same being one of the regular juridical days of the May Term, 1908, of said Court, the following proceedings, inter alia, were had and entered of record in said court, which said proceedings are in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4610.)

The trial of this cause having been continued to this day, the parties appeared in court by counsel, the jury being in the box was called and all answered, and further proceedings on trial were resumed. The plaintiff resumed the offer of documentary evidence, to-wit: depositions, parts of which had heretofore been offered and admitted and plaintiff rested.

Witnesses Dr. C. E. Yount, Dr. R. N. Looney, H. W. Heap, and F. L. Wright were sworn and testified for defendant, and defendant rested. The evidence being closed the cause was fully argued by the respective counsel, and the court instructed and charged the jury, and the jury retired in charge of bailiff, J. L. Merritt, duly sworn.

Subsequently, to-wit: at the hour of 5 o'clock P. M. the jury was returned into court, and, the counsel for respective parties being present, the jury being called by the Clerk and all answering, the jury returned the following verdict, to-wit: "We, the jury, find the issues in favor of the plaintiff, and assess the damages at $5000.00. Dennis A. Burke, Foreman." The verdict, being recorded,
45 was read to the jury by the Clerk, and the jury, being asked if that was their verdict as recorded, answered, "Yes, so say we all," and the jury was discharged.

And afterwards and upon, to wit: the 30th day of October, A. D. 1908, the same being one of the regular juridical days of the May, 1908, term of said court, the following order, inter alia, was had and entered of record in said court, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4610.)

On good cause shown, it was ordered that the hearing of motion for new trial herein be continued to the November Term, 1908.

And afterwards and upon, to-wit: the 21st day of November, A. D. 1908, the same being one of the regular juridical days of the November, 1908, Term of said Court, the following proceedings, inter alia, were had and entered of record in said court, which said proceedings are in words and figures as follows, to-wit:

(Title of Court and Cause, No. 4610.)

This cause came on to be heard upon defendant's motion for a new trial herein, J. M. Jamison appearing for plaintiff, C. F. Ainsworth and Paul Burks appearing for defendant. The motion was fully argued by counsel and submitted and by the Court overruled. Comes the defendant and gives notice in open court of appeal to the Supreme Court of the Territory of Arizona from the order
46 overruling defendant's motion for a new trial and from the judgment rendered herein. By agreement, execution is stayed for thirty days.

Clerk's Certificate.

TERRITORY OF ARIZONA,
County of Yavapai, ss:

I, J. M. Watts, Clerk of the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai, do hereby certify that the foregoing and hereunto attached papers are the original papers filed in the case of Lee H. Landis, Administrator of the Estate of George W. Sanders, Deceased, Plaintiff versus The Phoenix Railway Company, a corporation, Defendant; that the accompanying Minute Record, Certified Copy of Appeal Bond, Certified Copy of Supersedeas Bond, Judgment Roll, Motion for a New Trial, Reporter's Transcript of the Testimony as amended by order of Court and filed on February 15th, 1909, Depositions of Witnesses, and other papers constitute the entire Record on Appeal in said cause and that such Record contains a true copy of all Minute Entries made in said cause and of the Bond on
47 Appeal filed therein and that the papers attached to and which accompany this certificate are all the papers constituting the Record of the above entitled case, numbered 4610.

In witness whereof, I have hereunto set my hand and affixed my official seal at Prescott, Arizona, this 13th day of March, A. D. 1909.

[SEAL.] J. M. WATTS,
Clerk of said District Court.

And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said Court in said entitled cause copies of interrogatories to be propounded to Ed. S. Turner, a witness on behalf of the plaintiff, and his answers thereto, which, reduced to questions and answers, are in words and figures following, to-wit:

Deposition of Ed. S. Turner.

Title of Court and Cause.

Interrogatory 1. State your name, age, occupation and place of residence.

Answer. My name is E. S. Turner; am 36 years of age; am partner and manager of the Pioneer Grocery Company in El Paso, Texas, and my present residence is at El Paso.

Interrogatory 2. Were you in the city of Phoenix, Arizona, on or about the 20th March, 1902? If so, state when and how you arrived.

48 Answer. I arrived in Phoenix about 8 o'clock that evening from Wickenburg. I came in over the Santa Fe and got off at the Capitol Crossing and took the street car line from there into the City.

Interrogatory 3. If you state that you arrived in the evening over the Santa Fe, Prescott and Phoenix Railway state where you left the train.

Answer. As before stated, I left the train at the Capitol Crossing.

Interrogatory 4. On leaving the train, what means of conveyance up town did you take, and where did you go?

Answer. I took the street car from the Capitol crossing to First Avenue, where I left the car and walked home. I was then residing in Phoenix.

Interrogatory 5. Name any other persons, if you can, who left the train at the same time you did, and state if they took the same conveyance up town?

Answer. The names of some of the persons who left the train the same time I did and boarded the same car with me are: George W. Sanders, now deceased, George E. Sanders, his son, J. C. McKee and H. O. Annewalt.

Interrogatory 6. If in answer to the last two questions you state that you boarded a street car of the defendant, give the names of others and the respective positions they occupied on the car, as well as your own, as far as possible?

49 Answer. I do not recall the positions occupied by all whom I have named as boarding the street car when I did. I do know, however, that J. C. McKee sat on the front lateral seat

on the North side of the car, outside of the enclosed part of the car, and I was seated on the opposite side.

Interrogatory 7. In case you state that the deceased was on the same car, state where he sat or stood with reference to the position on the car occupied by you, whether he was within your view and with whom was he sitting.

Answer. In my answer to the previous question I stated the position the deceased occupied as well as my own and with whom he was sitting. Without repeating I adopt that answer here. The deceased was in my full view; I was partially turned in my seat.

Interrogatory 8. Do you know of an accident occurring that evening while riding on the car? If so, state how soon it was after you boarded the street car, and where it occurred?

Answer. Yes, an accident did occur that evening. It occurred at the curve in the track as the car was rounding from Adams Street on the Street at right angles with Adams Street on the east side of the Capitol Building, and it was but a short time after we boarded the car.

Interrogatory 9. State what the accident was and what caused it?

Answer. There is a sharp curve in the track on which the car was running at Adams Street and the Street running at
50 right angles with Adams Street on the East side of the Capitol building where the track makes a sharp curve to the South and the car was running at a pretty high rate of speed as it entered the curve, and as the car struck the curve it was with such force that it threw both Mr. Sanders and Mr. McKee violently to the ground.

Interrogatory 10. What observation, if any, did you make just prior to the accident as to the car nearing a curve in the track, and as to what position the motorman was occupying?

Answer. Just prior to the car running into the curve, and the accident, I noticed that the car was running at a pretty high rate of speed and I knew that the curve in the track was near by; I was about to call the motorman's attention to the fact of the speed and the curve ahead, but the car struck the curve before I spoke to him; he, the motorman, was stooping to pick up a nickel he had dropped and it was then I apprehended the danger of approaching the curve in the track at the rate of speed the car was running. Just as I was about to give word of warning the motorman sprang to the brake and shut off the current and applied the brakes violently, but it was too late to stop the speed of the car before it struck the curve.

Interrogatory 11. What was the motorman doing prior to and about the time the car was nearing a curve in the track in
51 case you have testified that it was nearing a curve at or about the time of the accident? And in this connection you may state your observation in detail of what did occur, giving the position of the motorman, yourself, the deceased and others. Also describe what happened to the deceased and others?

Answer. After starting the car where we got on the motorman took up the fares while the car was in motion; he then came forward and turned on the current, and just as he took up his position at the front to drive the car he dropped a nickel on the floor of the

car, he stooped to look for it and pick it up and then I noticed that the car was running at a pretty high rate of speed; the deceased and McKee were sitting in the same position taken by them when they first entered the car as I have before testified to. I was sitting opposite them partially turned in my seat; the motorman had been looking for the nickel he dropped and rose from picking it up just in time to apply the brake and shut off the current as the car struck the curve in the track, but it was too late to stop the speed of the car before the curve was struck, although he applied the brakes violently. Just as the car struck the curve Sanders and McKee were thrown from the car some fifteen feet where they landed. We all got off the car and went to their assistance. The deceased was groaning and seemed badly hurt and called for some one to raise him up.

52 Interrogatory 11*a*. State what position George W. Sanders, the deceased, was occupying as the car was approaching the curve, whether sitting, standing or partially standing, explaining fully his position and what he was doing as the car approached the curve?

Answer. As the car approached and struck the curve the deceased was sitting in the same position on the seat as when he first sat down beside Mr. McKee; he was turned a little in his seat, as I was, looking at the motorman searching for the nickel when the curve was struck; he was sitting and fully resting on the seat the same as I was and as also was McKee.

Interrogatory 12. If the deceased was thrown from the car, state his manner of flight, where he landed, if any one else and who, if you know, was thrown from the car at the same time and where such other person landed with reference to where the deceased landed?

Answer. I cannot state the manner of flight as my view was somewhat obstructed, but I saw both the deceased and Mr. McKee in the air, but did not see the manner of their landing. When we picked them up they were both close together about fifteen feet from the car on the ground.

Interrogatory 13. State the location of the accident and whether you were in a position to see all that occurred, stating your position on the car and the direction in which you were looking at the time of the accident and incidents as they occurred?

53 Answer. At the time the car struck the curve I was looking at the motorman who stood between me, Mr. Sanders and Mr. McKee directly in front. I was looking in the direction of Mr. Sanders and Mr. McKee and in the same direction toward which they were thrown.

Interrogatory 14. If you have testified that the deceased was thrown from the car, state what caused it, how he landed, how far from the car, his condition when he got up or was picked up, and if he was picked up who picked him up?

Answer. I have before stated what caused the accident. The car entered the curve in the track at so high a rate of speed that it made a violent lurch which caused both the deceased and Mr. McKee to be thrown in a Northeasterly direction with great violence. I did

not see them land. When we picked them up from the ground they were 15 to 20 feet from the car. Mr. Sanders' son and I assisted the deceased from the ground to the car with assistance of others whom I have forgotten. He was groaning and appeared to be badly hurt.

Interrogatory 15. State whether or not the deceased appeared to be injured from the fall?

Answer. The deceased groaned and complained of being injured and appeared to be injured.

Interrogatory 16. Did the motorman slow up the street car on entering the curve?

Answer. The motorman tried to slow-up the car but he was almost in the curve before he attempted to apply the brakes
51 and it was too late then to slacken before the car struck the curve.

Interrogatory 17. To what extent have you had experience in riding upon street cars, and does that experience enable you to form an opinion as to the speed at which this car was running at the time of the accident?

Answer. I have had experience in riding on street cars ever since the trolley system has been in use, and I believe that my experience in riding enables me to form an opinion as to the speed of a car on which I am riding.

Interrogatory 18. At what speed was the car running at the time of the accident, as compared with its running just before entering the curve?

Answer. As compared with the speed at which the car was running previous to the accident, I should say it had slowed down very little when it hit the curve, if any.

Interrogatory 19. What, in your opinion, was the rate of speed at which the car was running just previous to and at the time of the accident?

Answer. I should say the car struck the curve while running at about twelve miles an hour.

Interrogatory 20. Describe the accident in a continuous narration of incidents, beginning with the starting of the street car after boarding at the Santa Fe crossing to and including the starting of the car after the accident, detailing the acts of the motorman, the
53 deceased, yourself and others, where each was sitting or standing, if partly sitting and standing, the cause of the accident, describing the acts of the motorman, his failure in any respect to have the car under control, if he failed, what happened to the deceased and others, including yourself, the positions occupied by the various persons on the car, manner thrown from the car, manner of landing if thrown and whether the persons thrown got up and onto the car without assistance, and if with assistance who assisted? Give as much detail and name as many incidents as possible.

Answer. On entering the street car at the Santa Fe Crossing I took the lateral seat, front on the South side of the car; the deceased and Mr. McKee seated themselves on the front lateral seat opposite me facing the North and Mr. Sanders' son stood up holding to a post

in the front part of the car and facing in the direction the car ran. The motorman turned on the Electric current and started the car slowly; he then went back and took up fares and came forward and turned on the current full and then those of us sitting on the lateral seats in front handed our fares up; the motorman dropped a piece of money and then proceeded to search for it on the floor; I turned slightly in my seat so as to see the search being made by the motorman, and both Mr. McKee and Mr. Sanders, the deceased, were turned in their seats the same as I and looking at the motorman making his search; neither they nor I were off our seats, but were sitting slightly turned while sitting; the car was now run-
56 ning at a pretty high rate of speed; the motorman had not hold of either the current crank or the brake; I was about to call to him warning that we were nearing the curve in the track when he sprang quickly to the brake and shut off the current and applied the brake violently, but just as he shut off the current and applied the brake the car struck the curve causing a sudden and severe lurch; both the deceased and Mr. McKee went into the air and landed some 15 or 20 feet distant on the ground; the car was stopped just as it had made the straight track after rounding the curve; we got off and went to the assistance of Mr. McKee and Sanders; Mr. Sanders was groaning and called for help; his son and I assisted him to his feet and with the help of others we got him on the car; my view was somewhat obstructed so that I could not say just how they landed, whether one on the other or not.

E. S. TURNER.

Deposition taken before John H. Harper, Notary Public, in the County of El Paso, State of Texas, September 30th, 1904.

(Filed in the District Court Oct. 13, 1904.)

57 And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said Court in said entitled cause copies of interrogatories to be propounded to Frank De Massey, a witness on behalf of the plaintiff, and his answers thereto, which, reduced to questions and answers, are in words and figures following, to-wit:

Deposition of Frank De Massey.

Title of Court and Cause.

Interrogatory 1. State your name, age, place of residence if any, and occupation.

Answer. My name is Frank De Massey, my age is 53 years; I have no settled place of residence; my occupation is that of a professional cook, and am employed principally in mining camps.

Interrogatory 2. Were you acquainted with George W. Sanders during his lifetime, and if so, state when you first became acquainted with him, and where it was you first met him?

Answer. I was acquainted with George W. Sanders during his lifetime; I knew him for, perhaps, ten or fifteen years, but not intimately until I went to work for him at the Vulture mines early in January, 1902, and continued till latter part of December of same year when I quit. I went back to work for him again the latter part of November, 1903, and continued until after his demise;
58 he died in February, 1904, and I left in March.

Interrogatory 3. Were you at any time in the employ of the New Vulture Mining Company, and if so in what capacity?

Answer. I was in the employ of the New Vulture Mining Co., as cook, at the times stated in my last answer, and I here adopt the answer to the second interrogatory in so far as it applies to this question.

Interrogatory 4. If you answer the last question that you were in the employ of said mining company, then you may state who engaged you?

Answer. I was engaged by Mr. George W. Sanders.

Interrogatory 5. If you were engaged with said mining company state when you went to work first and when you quit? And if you was engaged at different times state them giving dates at which you began and when you quit?

Answer. As stated in answer to the second interrogatory, I began early in January, 1902, and quit latter part of December, same year; I began as cook again at the Vulture the latter part of November, 1903, and continued till in March 1904 when I quit.

Interrogatory 6. If George W. Sanders was in the employ of said mining company when you were, state in what capacity he was employed, at the different times you were employed, if you were?

Answer. Mr. Sanders was the general manager and super-
59 intendent of the New Vulture Mining Co. during the times I was employed by said Company, until his decease.

Interrogatory 7. State the kind and character of labor you know of said Sanders performing for said mining company when you first went to work for said company, and state whether he performed such labor without apparent fatigue or otherwise?

Answer. He had general charge of the mines and its operation when I went there. The cyanide plant was started or operated when I was first there for some weeks. Two or three days before he and Mr. McKee left for Phœnix in March, 1902, the last clean-up in the cyanide operation was made. When he and Mr. McKee returned from Phœnix on this trip both of them were injured and lame. Mr. Sanders could hardly walk. They informed me they had been in a street car accident at Phœnix. Prior to this injury Mr. Sanders performed all kinds of manual labor about the mines, besides directing its operations. During the cyanide operations he worked almost day and night; he was very strong and did not fatigue; he took hold of the manual labor, lifting and any thing there was to do the same as the men; he shod the horses; he did carpenter work, pumped the water from the mines, did the firing; went up and down the inclines and ladders in the mines; after getting my work done it was my habit to go out among the men and frequently took hold

with them and with Mr. Sanders; I envied the strength and
60 endurance of Mr. Sanders; he was a much older man than
I and I wondered at his strength and ability to labor without fatigue, besides he was so strong; he was stronger and endured more than any man he had in his employ, and worked more and longer hours. He had some fifteen men employed then.

Interrogatory 8. If at any time during your employment with said mining company Mr. Sanders was unable to perform the labor he had previously done state when that was, as nearly as you can.

Answer. After his return from Phœnix in March, 1902, with Mr. McKee he was never able to perform labor as before. They returned to the camp from Phœnix I should say about the 22d of March, 1902.

Interrogatory 9. Were you in the employ of said company on the 20th March, 1902, and if so how long thereafter did you continue?

Answer. I was in the employ of said company on the 20th March, 1902, and continued as I have before stated.

Interrogatory 10. State, if you know, where Mr. Sanders went on or about the 20th March, 1902. If you state that he went to Phœnix you may state when he returned and what was his condition physically when he returned?

Answer. Mr. Sanders left the camp for Phœnix about the morning of the 20th of March; he met Mr. McKee at Phœnix and they
came to Phœnix together, as I understood. As I have before
61 stated, I believe he returned to camp on the 22d and Mr.
McKee came with him. Mr. Sanders was lame, it was difficult for him to breathe; he complained of suffocation; he was bruised and sore over the heart and complained very much.

Interrogatory 11. Describe the physical condition of Mr. Sanders after his return from Phœnix about the 22d of March, 1902, to the camp, through to the time you left, giving incidents and anything you may have done for his assistance and relief?

Answer. In answer to the last question I have stated his condition when he returned to the camp. I now adopt that answer without repeating here and proceed to answer this 11th interrogatory further, as follows: I think Mr. McKee left for his home in Michigan on the 23d; Mr. Sanders drove Mr. McKee to Wickenburg and returned to camp next morning; he was completely fagged out and went to bed at once; he was still sore, lame and suffering from suffocation and complained of difficulty in breathing. I left for Phœnix about the 2d of April for a few days off; I would have left earlier but he was not able to write a check for me; he was still in bed when I left for Phœnix about the 2d of April; I returned to camp about the 7th or 8th of April and he was still in bed, but the next day he got up for a little while; after two or three days he got up and was up most of the time thereafter. From this on he was
not able to do manual labor; his appetite was poor and at
62 times he would eat scarcely anything for days at a time.
When he attempted to do anything it would bring on palpitation of the heart, choking and suffocation. This condition con-

tinued and grew worse during all the time I was at the camp. Between the 10th and 15th of July, 1902, Mr. Sanders' condition not improving but getting worse he decided to try California for relief and he and his wife left and returned from California the latter part of August following. His complexion was better but he suffered from palpitation, choking and suffocation as before. This condition continued and grew worse as time went on till I left in December following. Soon after his injury and often during all the time I was there I frequently went to his assistance to help his wife lift him up so he could get his breath, both night and day, and many times he was purple in the face before we got him up so he could breathe; after he recovered his breath he would be exhausted and would turn pale as a corpse. On one occasion the latter part of April or early May, 1902, I went down in one of the tunnels and discovered Mr. Sanders leaning against the wall and unable to move; I called Tabucia Villa and we brought him out; after this occurrence he would not go down in the mines alone and some one always went with him.

Interrogatory 12. What was his ability to perform labor as previously done after the 22d March, 1902, about the camp, and what effect had labor on him after that date, as compared with
63 his ability to labor prior to that time, giving any incidents that you may have seen of efforts on his part to labor and how it affected him?

Answer. He had no ability to perform physical labor after that date. I repeatedly saw him make effort to perform physical labor and it always resulted in palpitation and suffocation. I often stopped him when he was trying to do something and either do it myself or let it go undone. I have also often seen his wife stop him from attempts on his part to labor. Before he was hurt he carried the water from the kitchen to the office and living rooms, some 200 feet distant; he also carried the distilled water from the mill to the house for domestic use, some 400 to 500 feet. After his injury he often tried to do this, carry this water, but he was not able, and both his wife and I have stopped him when he was attempting it.

Interrogatory 13. If he did not perform labor after said 22d March which he had before then state what it was, who did it and whether he was able to perform any part of it?

Answer. I have already stated that he could not perform labor after the accident or injury that he had previously done; others did what he had previously done of physical labor.

Interrogatory 13. State in what manner exertion affected Mr. Sanders after said 22d March, and if he was so affected before then by labor?

64 Interrogatory 14. State anything you may know of Mr. Sanders after said 22d March in respect to his resting and how he was affected, stating anything you may have observed?

Answer. I have already given his condition up to the time I left the latter part of December, 1902. I will now state his condition when I returned to the camp in November, 1903 and from then on till he left in January, 1904, for Phoenix, where he died. I think he

left camp on the 25th January and he died on the 6th of February. When I returned to camp in November, 1903, his condition was much worse than when I last saw him, the previous December; he made some effort soon after I returned to get about while some surveying was going on about the mines and this produced swelling of his feet and legs and he continued to grow worse until he left for Phœnix; when he left camp for Phœnix the last time he was unable to get his shoes on.

Interrogatory 15. If Mr. Sanders did not perform the labor after the 22d March, 1902, he did previously, who did it?

Answer. Various other persons performed the labor after the 22d March, 1902, that was previous to that time performed by Mr. Sanders. The horses were shod in Wickenburg, tools, drills, etc. were sharpened by others, as was also the water pumped from the mines by a Mr. Gibson and others.

Interrogatory 16. What efforts, if any, do you know of
65 Mr. Sanders making after said 22d March to labor, and with what result, giving incidents?

Answer. I have already given the efforts of Mr. Sanders to labor after the injury and the results of such efforts. The incidents are very numerous but those I have named will serve to illustrate perhaps as well as if more were given.

Interrogatory 17. State what the general health of Mr. Sanders was previous to March, 1902, and his ability to labor and whether labor fatigued him and generally as to his strength and power of endurance?

Answer. I have known as to his general health for upwards of ten years. He was a man of great physical endurance. I knew him at Florence where he was engaged in some capacity with a flouring mill; I also knew him when he was engaged in some capacity with the canal company; I also knew him at Tucson; I always envied him his physical strength and physical endurance.

FRANK DE MASSEY.

Deposition taken before J. H. Langston, Notary Public, in the county of Maricopa, Territory of Arizona, August 6th, 1904.

And on the same day, to-wit: the sixteenth day of March, 1909
there was filed in the Clerk's office of said Court in said en-
66 titled cause copies of interrogatories to be propounded to George E. Sanders, Dan McNeil, E. L. Gibson, Charles Kinsley and Tubucia Villa, witnesses on behalf of the plaintiff, and their answers thereto, which, reduced to questions and answers, are in words and figures following, to-wit:

Deposition of George E. Sanders.

Title of Court and Cause.

Interrogatory 1. State your name, age, place of residence and occupation.

Answer. My name is George E. Sanders. My age 28 years.

My place of residence is at Wickenburg, Arizona, but I am in New York City part of the time transacting business, and my occupation is in connection with mining as President and Manager of the Vulture Development Company.

Interrogatory 2. What relationship, if any, did you bear to the deceased?

Answer. I am the son of the deceased George W. Sanders.

Interrogatory 3. Were you in the city of Phoenix, Arizona, on or about the 20th of March, 1902? If so state when and how you arrived?

Answer. Yes. I went from Wickenburg, in company with my father, to Phoenix on the freight train of the Santa Fe Prescott and Phœnix Railroad, arriving in Phœnix about dark of that day.

67 Interrogatory 4. If you state that you arrived in the evening over the Santa Fe, Prescott and Phœnix Railway, state where you left the train?

Answer. I left the train at the crossing of the Phœnix Street railway on Adams Street.

Interrogatory 5. What means of conveyance up-town did you take on leaving the train, and where did you go?

Answer. I boarded the East bound street car of the Phœnix Railway Company and went to the Hotel Adams on Center Street.

Interrogatory 6. Name any other persons, if you can, who left the train at the same time you did, and state if they took the same conveyance that you did?

Answer. The deceased Geo. W. Sanders, J. C. McKee, Ed. Turner and H. P. Anewalt and some others whose names I do not recall, left the train the same time I did and went up town with me on the same street car.

Interrogatory 7. If in answer to the last two questions you state that you boarded a street car of the defendant, give the names of others and positions they occupied on the car, as far as possible, as well as your own on the car?

Answer. I cannot now give the names of persons other than those I have already mentioned who were on the street car with me but there were others. My father and J. C. McKee sat down on

68 one of the outside seats at the front of the car to the left of the motorman. That seat having room for two only and the only other seat in the front of the car being occupied, I stood with my back against the front of the car with one hand against the pillar or post directly in front of me which supported the roof over the front of the car. This pillar or post was only a few inches from the end of the seat in which my father and Mr. McKee sat, Mr. McKee sitting nearest me. That seat was so situated that persons sitting in it faced outward so that Mr. McKee and my father were facing outward and their backs were toward the motorman who stood directly behind them. The other seat I referred to was on the other side of the car at the front in a corresponding position. Mr. Turner and Mr. Anewalt were not in the front part of the car.

Interrogatory 8. In case you state that the deceased was on the same car state where he sat or stood, and whether he was within your

view and if you saw him, stating where and with whom he was sitting or standing.

Answer. The deceased was on the same car I rode on; sat on the seat facing outward directly in front of me in the end of the seat nearest the front of the car and he was within my view all the time we were on the car. I stood facing him all the time we were on the car, talking with him and with Mr. McKee and I saw my father during all the time we were on the car.

Interrogatory 9. Do you know of an accident occurring that evening while riding upon the car, and if so, state how soon after
69 boarding the car and where it occurred?

Answer. Yes. An accident occurred that evening while we were riding upon the car between five and ten minutes after we boarded it. It occurred at the corner of Adams Street and the Street directly in front of the Capitol building, the name of which I have forgotten, at a point where the Street car turns the corner from Adams Street going to Washington Street. It occurred at the Northeast corner of the Capitol grounds.

Interrogatory 10. State the position of yourself and others on that car, particularly that of the deceased, when the accident occurred?

Answer. My father and Mr. McKee were sitting in the side seat facing outward as I have before stated and I was standing with my back against front of and braced against the pillar or post just back of seat my father was sitting in. The motorman was crouched down looking for some money that he had dropped. I was not watching nor did I have the other passengers in view.

Interrogatory 11. What was the character of the track on which the car was running when the accident occurred, straight or curved? If curved state, if you can, the character of the curve?

Answer. The track at the place the accident occurred contains a sharp curve, the car passing from Adams Street into the
70 Street on the East side of the Capitol grounds turning ¼ around, the two Streets here intersecting at right angles.

Interrogatory 12. At what speed was the car running at the time of the accident, as compared with its running previous to entering the curve, stating whether the car slowed down on entering or nearing the curve?

Answer. The car was running very rapidly when it reached the curve and did not slow up on entering it.

Interrogatory 13. State the extent of your experience in riding upon street cars, and like conveyances propelled by electricity, and whether from such experience you are able to give judgment as to the speed of an electric car on which you are riding?

Answer. In my opinion car was running at a rate of speed not less than ten miles per hour. I have done a great deal of riding on electric street cars and have ridden from ten to thirty miles daily for a number of weeks at a time and during the two years following the accident, nearly every day at one place or another I many times have ridden a distance known to me and timed the speed of the car by the time consumed in making the trip deducting stops.

Interrogatory 14. If in answer to the last question you state that

you are able to judge of such speed then you may state, in your opinion, the speed at which the car in question was running previous to and when it entered the curve?

71 Answer. Not less than ten miles per hour. It appeared to be a great deal more but being an old shaky car I discount my calculation 50% of what it would be if it had been a smooth running car and no chance for deception of sight as to motion and movement of car.

Interrogatory 15. Describe the accident fully and in detail, if you have stated that one did occur, beginning with the positions occupied by the deceased, yourself and others on the car, previous to and at the time of the accident, following it through to what happened to the deceased, concluding your narration with the starting of the car after the accident?

Answer. There was no conductor on the car and the motorman collected the fares. He had proceeded to the rear of the car and collected the fares toward the front. The car was in motion going at about half speed during the time the motorman was collecting the fares. When fares were collected the motorman placed one hand on the controller and started the car faster. I was standing just back of the lateral seats in front holding to a post; Father and Mr. McKee were sitting on the lateral seat in front facing to the North; the lateral seat facing to the South was occupied and between these two lateral seats was the motorman and I stood facing all of them holding on to the post; the motorman dropped a piece of money and stooped to look for it; the car was running pretty fast; the

72 current was on and the motorman had let go of the controller and brake and went in search of the money; Mr. McKee, and father were turned slightly in their seats, but sitting full upon the seat observing the motorman's search for the money; suddenly the motorman sprang up and shut off the current and applied the brake with great violence and at the same time the car entered the curve in the track and the lurch was so violent that it threw me violently against the post I was holding onto and Mr. McKee and father went into the air and made a somersault, as it seemed to me, and both landed some 15 or 20 feet from the car in a mix-up one coming down upon the other; I think father falling under; the car was stopped when it had rounded the curve. We all got off and went to the assistance; I think Mr. McKee was able to get up without assistance but father was not; Mr. Turner myself and some one else assisted him to his feet and on the car; he called for help and was unable to get up or get to the car alone.

Interrogatory 16. If the deceased was thrown from the car, state where he landed, how far from the car and the manner of his landing?

Answer. My father struck the ground at a point at least fifteen feet from the point at which he was thrown from the car; after turning a somersault he landed on his back with his head nearest the track.

Interrogatory 17. If others were thrown from the car,
73 state when, where they were sitting and where they landed?

Answer. I saw Mr McKee thrown from a sitting position beside my father and landed on my father; my father by being on the front end was first thrown and landed first, Mr McKee immediately following.

Interrogatory 18. Who was in charge of the car, whether one or two persons? If you answer one, then state what he did besides acting as motorman.

Answer. Only one man had charge of the car, the motorman. There was no conductor. He collected the fares and also operated the car. I do not know his name.

Interrogatory 19. What was he doing at the time of and just previous to the accident?

Answer. At the time of and just previous to the accident, the motorman was crouching down on his feet behind the sheet iron front of the car searching for some money he had dropped.

Interrogatory 20. Describe your experience of this accident, stating your position on the car and what happened to you?

Answer. I was at the time of the accident standing with my back against the front of the car bracing myself against the pillar or post in front of me against which I was thrown, striking it with my shoulder.

Interrogatory 21. What injuries, if any, did the deceased sustain in this accident.

74 Answer. My father was groaning when I picked him up and apparently was unable to talk until we had carried him back to the car. He was completely covered with dirt and cinders and had dirt even in his mouth. As soon as he got the dirt out of his mouth I asked him where he was hurt and he said on the hip and in the chest. That night at the Hotel Adams he spit considerable blood and the next day he had a stiff neck and back and complained of pain in the chest. My father was black and blue on the chest and on his hip just after the accident. I saw the black and blue places as soon as he took his clothes off.

Interrogatory 22. State what complaints he made at the time and soon after the accident, giving any exclamations of pain made by him? Also state what complaints he made during the same night after the accident as to injuries, and state what exclamations of pain he made.

Answer. My father was very much worried and stated that he was badly injured internally and that he was suffering continuous pain; the medicine used doing very little good if any.

Interrogatory 23. What was the physical health and endurance of the deceased for a year or two years prior to this accident, stating fully your knowledge and means of knowing?

Answer. I saw my father pretty nearly every day during the year just previous to this accident and know that he was in good health.

He during that time had no illness of any kind that I know
75 of except an occasional headache. He was a strong vigorous man. He had as much endurance as any man I know. I

have known him during the time shortly prior to the accident to climb up and down ladders at the mines for five or six hours continuously without complaint and without showing evidence of fatigue.

Interrogatory 24. State what his physical health was and power of endurance of manual labor was for five and more years previous to this accident, giving your means of knowledge?

Answer. His health was always good. He was able to do any kind of work and did it when there was any occasion for it. I know this to be so having done various things with him and was with him a great deal of the time.

Interrogatory 25. In what business and where was deceased engaged prior to his engaging with the New Vulture Mining Company, and when did he so engage with said company, if he did?

Answer. He was following his profession as a mining engineer and was receiver for the Casa Grande Valley Canal Company who had about forty miles of Canal, head gates and a reservoir, besides laterals and ditches, which required inspection and new work continually, besides the adjustment of a large number of accounts and making new contracts, all of which he personally attended to. He lived in Florence and Tucson. He engaged with the New
76 Vulture Mining Company in 1898.

Interrogatory 26. What physical disability, if any, has or did the deceased suffer after the accident which he did not previous thereto, if you know, describing such disability?

Answer. Prior to my departure from Arizona he had lost his strength to such an extent that he was unable to go in and out of the mine as he had before the accident. He did not have the use of his arm and to attempt to climb the incline pained him both in chest and hip. He even complained that walking hurt him at times; he stated to me that any exertion or attempt to work affected his heart to such an extent that he became exhausted.

Interrogatory 27. What was the occupation of deceased prior to and at the time of the accident.

Answer. Previous to and at the time of the accident, my father was a Mining Superintendent and was engaged in that occupation up to the time of his death; he was also a mining engineer.

Interrogatory 28. Compared with the health and strength of deceased previous to the accident to pursue his occupation what was it after the accident until his decease in respect to physical endurance to perform labor and pursue his occupation?

Answer. When I last saw my father at regular intervals which was from July, 1902, his physical condition and endurance
77 were very poor as compared with his health and strength previous to the accident; at the time I saw him last he was not physically strong and could endure but little physical labor. He could not ride over rough roads, go up or down ladders or take rock samples as he could before the accident.

GEORGE E. SANDERS.

Deposition taken before D. J. Curry, Notary Public, in the County of Maricopa, Territory of Arizona, July 16th, 1904.

Answer. I did not see Mr. Sanders do any manual labor after the accident, I have seen him try to walk around the town of Wickenburg and also Phoenix when he was so weak that he could hardly get around, was with him when he could hardly get to the depot at Phoenix, he was so weak and exhausted.

Interrogatory 9. What do you know of his strength and ability to labor without fatigue, if so, prior to said accident, giving the kind of labor you have seen him perform and how he seemed to stand it?

80 Answer. Mr. Sanders' strength and ability to labor before the accident was the very best; I have seen him climb up and down shafts in the Vulture mines, help to timber in the mine, repair cars, etc., without showing any fatigue.

Interrogatory 10. What do you know of his strength and ability to perform physical labor after the accident, giving such incidents and circumstances as you may have observed, and how such labor affected him, giving the kinds of labor you saw him perform or attempt?

Answer. From my observations of Mr. Sanders' movements after the accident, I don't think he had strength or ability to perform physical labor. I have seen him walk from my house to the depot, a short distance, perhaps 200 feet, when it was an effort for him to do it.

Interrogatory 11. If you have seen him at any time or place since the accident and before his decease suffering, exhausted or sick, state the circumstances fully, and what caused it if you know?

Answer. Yes I have seen Mr. Sanders suffering and exhausted at the McNeil house in Wickenburg. He could not sleep. We had to put cloths to his head and hot irons to his feet. On several occasions when he was all ready to leave Wickenburg for the Vulture he would have to remain at my house several hours during a weak and exhausted spell, before he could start; his feet and legs

81 would swell up and his heart beat very violently. He often said it all came from the injury to his heart, which he received in the accident, and that he never expected to get over it.

Interrogatory 12. If you have seen him attempt to perform labor at any time when he was obliged to quit because of fatigue, exhaustion or sickness state how he was affected and what, if anything, you did to relieve him, or in an attempt to relieve him?

Answer. I haven't seen Mr. Sanders attempt to perform labor since the accident, but I saw him attempt to get into a buggy and failed, and I had to assist him.

Interrogatory 13. Describe fully how labor affected him, or exercise of any kind, after the accident, giving incidents, time, place and all circumstances you can recall.

Answer. After the accident, I walked around both Wickenburg and Phoenix with Mr. Sanders when he complained of exhaustion and weakness and had to walk very slowly and carefully.

Interrogatory 14. What, if anything, did you ever do for or toward his relief at any time when he was suffering, giving as many incidents as you can with the circumstances, of what he was doing

Deposition of Dan McNeil.

Title of Court and Cause.

Interrogatory 1. State your name, age, residence and occupation.

Answer. My name is Daniel McNeil. My age is 50 years, my place of residence is Wickenburg, Arizona. My occupation is foreman of the Vulture Mines.

Interrogatory 2. Were you acquainted with George W. Sanders during his lifetime? If so, state when you first became acquainted with —, where you first met him and how well you have known him since?

Answer. Yes, I first became acquainted with Mr. Sanders in the year 1898, at the Vulture Mines, I have known him ever
78 since up to the time of his death.

Interrogatory 3. Did you hear of an accident about the 20th day of March, 1902, at Phœnix, in which said George W. Sanders was injured, by being thrown from a street car, or otherwise?

Answer. Yes I heard of an accident in which Mr. Sanders was injured by being thrown from a street car at Phœnix.

Interrogatory 4. If you answer to the last question that you did hear of such an accident state when you heard of it first, and how soon after the accident occurred you heard of it and saw Mr. Sanders?

Answer. I heard of the accident one or two days after it occurred, Mr. Sanders told me of it on his return from Phœnix.

Interrogatory 5. If you worked for or under Mr. Sanders prior to said accident, state when and where you so worked, and the kind of work you were doing. And if you worked at different times before the accident state when it was and the kind of work?

Answer. I worked under Mr. Sanders at the Vulture Mines six years ago mining and again four years ago at the same place mining and cyaniding.

Interrogatory 6. If you saw George W. Sanders perform manual labor prior to the accident, state the character of the labor done by him and state what his power of endurance was to perform
79 such labor, whether he fatigued or not?

Answer. Yes I saw Mr. Sanders perform manual labor, prior to the accident, running a steam pump and acting as mining engineer, his power of endurance to perform labor at that time was as good as that of the ordinary strong man. Have never noticed him fatigued.

Interrogatory 7. If you worked for or under Mr. Sanders after the accident state when it was, what you did, when it was, how often if not constant, and where it was?

Answer. I did not work for Mr. Sanders after the accident.

Interrogatory 8. Did he work with you or about where you could see him work? If yes, then state what he did, how he stood the work and how work affected him after the accident as compared with work before the accident? State the kinds of work in all cases.

to cause it if you know, stating fully how and where you found him and how long it would be before he could get out after such incidents?

Answer. At times when Mr. Sanders was suffering I have relieved him by getting hot irons for his feet and bottles of
82 hot water also, and gave him hot drinks; Mr. Sanders generally stopped at my house when in Wickenburg and sometimes it would take him two or three hours and sometimes all night before he could get away, after one of these spells of exhaustion or heart trouble. The cause of it as far as I know would be nothing more than coming from the Vulture to Wickenburg in a buggy, or coming from Phœnix to Wickenburg on the train. I know of his going to bed in my house even in the forenoon, on several occasions from exhaustion and weakness.

Interrogatory 15. Did you ever know of such incidents and happenings to him as recited in your last four answers prior to the accident, and how soon after the accident did you first observe the conditions you have just described and whether it grew worse or better from the first?

Answer. No sir, I have never known of a case of weakness or exhaustion in Mr. Sanders prior to the accident and I have been with him and have seen him very much. When I first observed his injured or weak condition was one or two days after the accident. I met him on the platform of the depot on his return from Phœnix, he was holding his hand on one side of his breast. I asked him what was the trouble and he said that they pretty nearly killed him and Mr. McKee on a street car at Phœnix. He also complained of his hip and moved with apparent distress. He seemed to get worse right along from the first.

83 Interrogatory 16. What labor and duties did you know of his performing about the Vulture Mines and elsewhere prior to the accident which required physical labor, and with what ease did he perform such labor?

Answer. I have known Mr. Sanders, prior to the accident, to run the cyanide plant at the Vulture Mine, to timber the shaft in places, and to climb up and down the shafts of the Vulture Mine having been with him and helping him and he did it with as much ease as any healthy laborer could do it.

Interrogatory 17. Do you know of labor about the mines that he performed prior to the accident which he could not after the accident? If you do state fully and describe what you know of any attempt and failure to so labor after the accident as before?

Answer. Yes, Mr. Sanders performed the labor just mentioned, before the accident, which I know from personal knowledge of his strength, he could not do after the accident.

Interrogatory 18. If he grew worse after the accident as time passed state fully what you observed and know in that respect it affected him?

Answer. Mr. Sanders grew worse after the accident. I noticed that he became more exhausted and weaker as time passed and his

legs and feet were more swollen. I observed also that the palpitation of his heart became more severe as time passed.

84 Interrogatory 19. State any other fact or circumstance that you may know *with* may tend to show what the condition of the deceased was after the accident at any time as compared to what it was prior to the accident?

Answer. Before the accident referred to I considered Mr. Sanders one of the healthiest men in the country. He was able and did do all kinds of manual labor that was necessary about a mine and in his work he showed as much strength and endurance as any man he had working for him. At that time I never saw him played out or exhausted. After the accident, every time I saw him he was complaining of a pain in his breast and of shortness of his breath and seemed exhausted and weak. I don't think he was then capable of any manual labor. He seemed to be getting worse and worse from day to day. His injury seemed to continually affect him from the first, only his strength was better in the beginning but gradually failed him and to my observation, every week and month found him weaker and more exhausted than before.

DAN McNEIL.

Deposition taken before D. J. Curry, Notary Public, in the County of Maricopa, Territory of Arizona, September 15th, 1904.

85 *Deposition of Ernest L. Gibson.*

Title of Court and Cause.

Interrogatory 1. State your name, age, residence and occupation.

Answer. My name is Ernest L. Gibson. My age 37 years. My place of residence is at Wickenburg, Arizona, and my occupation is stationary engineer.

Interrogatory 2. Were you acquainted with George W. Sanders during his lifetime? If so, state when you first became acquainted with —, where you first met him and how well you have known him since?

Answer. Yes, I have been acquainted with Mr. Sanders during his lifetime. I first met him in the year 1898, at the Vulture mines and I became well acquainted with him in the year 1900; and have worked with him and lived with him off and on, for four years.

Interrogatory 3. Did you hear of an accident about the 20th day of March, 1902, at Phœnix, in which said George W. Sanders was injured, by being thrown from a street car, or otherwise?

Answer. Yes, I heard of an accident at Phœnix, in March 1902, in which Mr. Sanders was injured by being thrown from a street car.

Interrogatory 4. If you answer to the last question that you did hear of such an accident state when you heard of it first, and how soon after the accident occurred you heard of it and saw Mr.

86 Sanders?

Answer. I think I read it first in a Phœnix paper. I think I read it the day after the accident. On his return from Phœnix,

after the accident I met Mr. Sanders at the depot at Wickenburg and asked him what the matter was and he told me that he was thrown from a street car and very nearly killed and didn't think he would ever get over it.

Interrogatory 5. If you worked for or under Mr. Sanders prior to said accident, state when and where you so worked, and the kind of work you were doing. And if you worked at different times before the accident state when it was and the kind of work?

Answer. Yes I worked for Mr. Sanders, prior to the accident, not steadily but more or less about every month from the year 1900 up to the time of the accident. My work was pumping water and keeping the machinery etc., in repair, at the Vulture mines.

Interrogatory 6. If you saw George W. Sanders perform manual labor prior to the accident, state the character of the labor done by him and state what his power of endurance was to perform such labor, whether he fatigued or not?

Answer. Yes I saw Mr. Sanders do some heavy lifting for a short while at different times, he did that helping me around the boiler. His endurance was as good as that of any man. No, I noticed no fatigue any more than any man would show in natural health. I
87 have walked in and out of the mine at the Vulture with Mr. Sanders and through the mine several times which is all difficult and the hardest kind of work, and he did not seem a bit fatigued, he was able to go when I could not.

Interrogatory 7. If you worked for or under Mr. Sanders after the accident state when it was, what you did, when it was, how often if not constant, and where it was?

Answer. Yes I worked for Mr. Sanders, after the accident, approximately once a month from the time of the accident until his death, pumping water and keeping machinery in repair at the Vulture mines. The time spent there in each case was about a part of three days.

Interrogatory 8. Did he work with you or about where you could see him work? If yes, then state what he did, how he stood the work and how work affected him after the accident as compared with work before the accident? State the kinds of work in all cases.

Answer. Yes Mr. Sanders tried to help me a time or two around the boiler putting in flues but couldn't do it. He practically had no use of one arm and shoulder and his heart beat so hard when he tried to do anything that he had to quit. I have seen him sit down and shake with the pulsations of his heart. This was at the Vulture mines and after the accident.

Interrogatory 9. What do you know of his strength and ability to labor without fatigue, if so, prior to said accident, giving the kind
88 of labor you have seen him perform and how he seemed to stand it?

Answer. I know from working with Mr. Sanders that his strength and ability to perform labor was as good or better than the ordinary laboring man, prior to the accident.

Interrogatory 10. What do you know of his strength and ability to perform physical labor after the accident, giving such incidents

and circumstances as you may have observed, and how such labor affected him, giving the kinds of labor you saw him perform or attempt?

Answer. Mr. Sanders had neither strength nor ability to perform physical labor after the accident. He practically had no use of one arm and shoulder. I have seen him helped to bed at different times and I have seen him attempt to walk from his office at the Vulture to the mine and have to sit down and rest.

Interrogatory 11. If you have seen him at any time or place since the accident and before his decease suffering, exhausted or sick, state the circumstances fully, and what caused it if you know?

Answer. I have seen Mr. Sanders, since the accident, exhausted in trying to walk from his office up to the mine at the Vulture and have to sit down with the fluttering of his heart and entirely exhausted, so much so that he would have to sit down for fifteen or twenty minutes at a time. I have observed this at different times.

As to the cause, I only know that he always said that he had
89 no breath and had no use of himself since he was thrown from the street car.

Interrogatory 12. If you have seen him attempt to perform labor at any time when he was obliged to quit because of fatigue, exhaustion or sickness state how he was affected and what, if anything, you did to relieve him, or in an attempt to relieve him?

Answer. I have seen Mr Sanders attempt a great many times to come up to the works and in many cases I have helped him to sit down and lie down when he was exhausted and had to quit, he was simply exhausted and had no breath.

Interrogatory 13. Describe fully how labor affected him, or exercise of any kind, after the accident, giving incidents, time, place and all circumstances you can recall.

Answer. After the accident Mr. Sanders was not able to perform physial labor. I have seen him try to walk around at the Vulture and also at Wickenburg and have seen him supporting himself on the fences. He was out of breath and complained of being out of breath and of pain in his side, shoulder and heart.

Interrogatory 14. What, if anything, did you ever do for or towards his relief at any time when he was suffering, giving as many incidents as you can with the circumstances, of what he was doing to cause it if you know, stating fully how and where you found him and how long it would be before he could get out after such incidents?

90 Answer. Nothing more than go to his relief and help him to a seat or help him to lie down when he was suffering, this was both at the Vulture and in Wickenburg. I have seen him from twenty minutes to twenty-four hours before he would get over those weak spells. I have seen this at different times both in Wickenburg and at the Vulture.

Interrogatory 15. Did you ever know of such incidents and happenings to him as recited in your last four answers prior to the accident, and how soon after the accident did you first observe the con-

ditions you have just described and whether it grew worse or better from the first?

Answer. No sir, I have never known anything to be wrong with Mr. Sanders' health before the accident. I noticed shortly after the accident that he was failing and continued to get worse clear on to the time of his death.

Interrogatory 16. What labor and duties did you know of his performing about the Vulture Mines and elsewhere prior to the accidents which required physical labor, and with what ease did he perform such labor?

Answer. I have stated that I saw Mr. Sanders prior to the accident perform labor and duties in and around the Vulture Mines that required physical strength and endurance and he did it with as much ease as any robust man could do it in the best of health.

Interrogatory 17. Do you know of labor about the mines that he performed prior to the accident which he could not after the
91 accident? If you do state fully and describe what you know of any attempt and failure to so labor after the accident as before.

Answer. Yes, prior to the accident I have seen Mr. Sanders fire the boiler and run the pump and doing everything about it. I never saw him do it after he was hurt.

Interrogatory 18. If he grew worse after the accident as time passed state fully what you observed and knew in that respect it affected him?

Answer. Yes, Mr. Sanders grew worse after the accident as time passed, I observed that he was very weak and short of breath and didn't eat anything to speak of and that he complained continually of his heart and shoulder hurting him.

Interrogatory 19. State any other fact or circumstance that you may know which may tend to show what the condition of the deceased was after the accident at any time as compared to what it was prior to the accident?

Answer. Prior to the accident I never saw Mr. Sanders except when he was in good health and in good spirits. I had never heard him complain of being tired, sick, exhausted or otherwise. After the accident, I have never seen him when he seemed to be well or able to do physical labor.

ERNEST L. GIBSON.

Deposition taken before D. J. Curry, Notary Public, in the County of Maricopa, Territory of Arizona, August 8th, 1904.

92 *Deposition of Charles L. Kinsley.*

Title of Court and Cause.

Interrogatory 1. State your name, age, residence and occupation.

Answer. My name is Charles L. Kinsley. My age 36 years. My place of residence is at the Vulture Mines, in Maricopa County, Arizona, and my occupation is Mine Superintendent.

Interrogatory 2. Were you acquainted with George W. Sanders during his lifetime? If so, state when you first became acquainted with, where you first met him, and how well you have known him since?

Answer. Yes, I first became acquainted with the deceased Geo. W. Sanders, in the year 1900. I met him in Phœnix. Since then I have known him in his lifetime, quite intimately, having lived in the same camp with him much of the time.

Interrogatory 3. Did you hear of an accident about the 20th day of March, 1902, at Phœnix, in which said George W. Sanders was injured, by being thrown from a street car, or otherwise?

Answer. I did hear of the accident having seen mention made of it in a Phœnix newspaper and was told of it by Mr. Sanders a few days later on his return from Phœnix to Wickenburg and the Vulture Camp.

Interrogatory 4. If you answer to the last question that you did hear of such an accident state when you heard of it first, and
93 how soon after the accident occurred you heard of it and saw Mr. Sanders?

Answer. I cannot state exactly when I heard of the accident first but must have been about two or three days after it occurred.

Interrogatory 5. If you worked for or under Mr. Sanders prior to said accident, state when and where you so worked, and the kind of work you were doing. And if you worked at different times before the accident state when it was and the kind of work?

Answer. I worked under Mr. Sanders, at Vulture Mine, all of year 1901, and until about the first of April, 1902. I worked and acted as foreman of cyanide plant and worked in and about the hoisting and pumping plant as well as taking Mr. Sanders back and forth to Wickenburg.

Interrogatory 6. If you saw George W. Sanders perform manual labor prior to the accident, state the character of the labor done by him and state what his power of endurance was to perform such labor, whether he fatigued or not?

Answer. I saw Mr. Sanders perform labor occasionally in and around cyanide plant when we were short handed and during clean up days and the other work performed by him consisted of showing various parties the mine and its workings, on which occasions I generally went along helping to obtain samples etc. This work necessitated much hard climbing and the taking of samples
94 was very difficult owing to the hardness of the quartz. He seemed very rugged and showed no signs of fatigue although six and seven hours at a time were often spent on those trips. This was previous to the accident.

Interrogatory 7. If you worked for or under Mr. Sanders after the accident state when it was, what you did, when it was, how often if not constant, and where it was?

Answer. I performed about the same work after the accident as before, except that I supervised it alone and was not assisted by Mr. Sanders, as every effort seemed to distress him and he did not go far

from his office, at which place I saw him a number of times each day. This was at the Vulture Mines.

Interrogatory 8. Did he work with you or about where you could see him work? If yes, then state what he did, how he stood the work and how work affected him after the accident as compared with work before the accident? State the kinds of work in all cases.

Answer. After the accident Mr. Sanders was not able to do any thing while I remained with him. He went to the cyanid plant on two occasions but was in a much exhausted condition and I had to help him back to his house. When he returned from Phœnix after the accident, it was necessary to help him in and out of the conveyance to the mine.

Interrogatory 9. What do you know of his strength and ability to labor without fatigue, if so, prior to said accident, giving the kind of labor you have seen him perform and how he seemed
95 to stand it?

Answer. Mr. Sanders seemed as strong and active as any man, prior to said accident. His work was that of climbing in and out of the Vulture Mine and its workings and for an occasional inspection and repair of pumps etc. used in connection with cyanide plant. He helped around cyanide plant occasionally shoveling and dumping cars of tailings and on cleanup days of cyanide plant assisted, which necessitated handling heavy tubs of water and cyanide slimes and running a hand pump. He stood it without any noticeable effort and often worked with me drying slimes for shipment, at night after working all day. He often helped me to load and unload wagon loads of horse feed and provisions.

Interrogatory 10. What do you know of his strength and ability to perform physical labor after the accident, giving such incidents and circumstances as you may have observed, and how such labor affected him, giving the kinds of labor you saw him perform or attempt?

Answer. After the accident it was practically impossible for Mr. Sanders to perform any work as it exhausted him to walk around and I often had to wait on him as I could see he had no strength and I saw when parts of his body was black and blue and showed that it must have been very sore. I would not allow him to attempt any labor while I was with him.

Interrogatory 11. If you have seen him at any time or
96 place since the accident and before his decease suffering, exhausted or sick, state the circumstances fully, and what caused it if you know?

Answer. After my departure from the Vulture mine I have seen Mr. Sanders many times at the request of his son to perform some service that would help him in many ways during the balance of the year 1902 and during the year 1903. He continued to be in the same poor condition as in the latter part of March after his accident in Phœnix, the circumstances of it having been recited to to me and I have known him to be confined to his bed a number of days.

Interrogatory 12. If you have seen him attempt to perform labor at any time when he was obliged to quit because of fatigue, exhausted or sickness state how he was affected and what, if anything, you did to relieve him, or in an attempt to relieve him?

Answer. I did not see Mr. Sanders perform any labor after the accident as while I was around I did not allow him to, as I could see his weakened condition and that he was not able to do any work. I have at times helped him while walking, and in and out of a conveyance.

Interrogatory 13. Describe fully how labor affected him, or exercise of any kind, after the accident, giving incidents, time, place and all circumstances you can recall.

Answer. Did not see him do any labor after the accident.
97 When at the Vulture mine he came up to the works I frequently had to help him back to the house and whenever I was around him I did some personal service up to and in the month of November 1903. This was as often as once a month on an average.

Interrogatory 14. What, if anything, did you ever do for or toward his relief at any time when he was suffering, giving as many incidents as you can with the circumstances, of what he was doing to cause it if you know, stating fully how and where you found him and how long it would be before he could get out after such incidents?

Answer. After Mr. Sanders' return from Phœnix and after the accident, I have helped his wife to take care of him, in ways previously answered.

Interrogatory 15. Did you ever know of such incidents and happenings to him as recited in your last four answers prior to the accident, and how soon after the accident did you first observe the conditions you have just described and whether it grew worse or better from the first?

Answer. I never knew anything to be the matter with Mr. Sanders prior to the accident, except possibly a slight attack of biliousness. Since the accident I have never known him to be well. He seemed to get a little worse each month.

Interrogatory 16. What labor and duties did you know of his performing about the Vulture Mines and elsewhere prior to the
98 accident which required physical labor, and with what ease did he perform such labor

Answer. I know of Mr. Sanders working about the cyanide plant at the Vulture mine as before stated and taking ore samples in the mine and workings prior to the accident. He seemed to perform the work as well as any workman.

Interrogatory 17. Do you know of labor about the mines that he performed prior to the accident which he could not after the accident? If you do state fully and describe what you know of any attempt and failure to so labor after the accident as before?

Answer. From my observations I would say that Mr. Sanders was never able to perform after the accident such work as he did before, as I know from personal knowledge of many kinds of work that such labor requires strength and endurance.

Interrogatory 18. If he grew worse after the accident as time passed state fully what you observed and know in that respect it affected him?

Answer. After the accident Mr. Sanders grew steadily worse and never had the healthy appearance and vigor that he did before. He was thin and appeared weak and sickly.

Interrogatory 19. State any other fact or circumstance that you may know which may tend to show what the condition of the deceased was after the accident at any time as compared to what it was prior to the accident?

99 Answer. At first, after the accident, Mr. Sanders limped in walking and during spells afterwards, and seemed to be practically without the use of one arm and did not eat anything to speak of compared to previously.

CHARLES L. KINSLEY.

Deposition taken before D. J. Curry, Notary Public, in the County of Maricopa, Territory of Arizona, September 17th, 1904.

(Filed in the District Court Oct. 3, 1904.)

And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said Court in said entitled cause copies of interrogatories to be propounded to Dr. R. S. Slusher, a witness on behalf of the plaintiff, and his answers thereto, which, reduced to questions and answers, are in words and figures following, to-wit:

Deposition of Dr. R. S. Slusher.

Title of Court and Cause.

Interrogatory 1. State your name, age, occupation and place of residence.

Answer. My name is R. Sylvanus Slusher, age 27, occupation physician & surgeon, residence Denver.

100 Interrogatory 2. If you state that you are a physician and surgeon, you may state when and at what medical college you graduated.

Answer. I am a graduate of Barnes' Medical College of St. Louis, class of 1900. I located at Wickenburg, Arizona, October 17, 1902, and left there May 24, 1903, practicing my profession meanwhile.

Interrogatory 3. If you practiced your profession at Wickenburg, Arizona, at any time, state for what length of time, stating when you went there and when you left.

Answer. The above is in answer to interrogatory three.

Interrogatory 4. If you became acquainted with George W. Sanders, deceased, during his lifetime, state when and the extent of that acquaintance until his decease, if you know of his decease.

Answer. I was personally acquainted with George W. Sanders, having met in the summer of 1902, knowing him from that time until his death both as my patient and friend.

Interrogatory 5. If the deceased applied to you at any time professionally state when it was, where it was and the circumstances under which he applied.

Answer. Mr. Sanders first called at my office in Wickenburg late in December, 1902, and applied to me for treatment.

Interrogatory 6. If he did apply to you professionally, state the trouble from which he was suffering in detail and how long he was under your treatment. And in this connection you may state
101 if the trouble from which he was suffering and for which you treated him grew better or worse as time went on, describing the progress in detail, for the better or worse.

Answer. At the time of my first examination of Mr. Sanders, I found him to be suffering from the effects of a dilated heart. He was short of breath, capillaries of the face were congested; the pulse very irregular and counted with difficulty. I found that upon slight physical exertion, the pulse jumped from something near normal to one hundred and thirty or thirty-five. The lower extremities were somewhat dropsical. The patient complained of loss of sleep, loss of appetite, inability to work and swelling of the feet. The shortness of breath was pronounced. The patient improved in fairly satisfactory manner during the first two or three months of my treatment. He reported the sleep was much more restful and could walk further and eat more than before beginning treatment. The pain about the heart, of which he had repeatedly complained, was somewhat relieved. The swelling of the feet was also less. However, as time went on, the heart seemed to fail to respond to treatment. He was under my supervision until May 24, 1903. Early in May, as the warm season approached, his condition became so grave, that I advised him to go to the coast in California for the summer. All his symptoms at this time were progressing unfavorably. Examination of the urine, however, revealed no albumen.

102 Interrogatory 7. What effect did physical exertion have upon him during the time he was under your charge, describing how he was affected when he made exertion, giving incidents of the manner he was affected.

Answer. I have partially answered this under question six. At all times during my treatment of him, the least exertion caused the heart to palpitate and beat very rapidly and at times intermittently. On violent exercise, he complained of suffocation, coughing and vomiting. I cautioned him repeatedly on the necessity of his refraining from work or excitement, knowing that with this heart condition the dangers resulting would be great.

Interrogatory 8. If at any time after you ceased to attend deceased professionally as your patient, you may state if you saw him, if so, when, where, how often and what if any examinations or observations did you make of his condition and what that condition was as compared — when he was treating with you, stating if he was suffering from the same trouble, and if so whether he was better or worse, during his lifetime.

Answer. I again saw Mr. Sanders in the fall and autumn of 1903. On one occasion in November 1903, I visited him at his home at the

Vulture Mine. On this occasion I made a careful physical examination. Also in the same month I saw him at Phœnix in the office of Dr. Foss, and at other times I saw him. On all these occasions, I observed his condition carefully, and was impressed by the
103 fact that less exertion affected him than when I first saw him. At times, I was unable to count the pulse because of its irregularity. He was suffering from the same symptoms as formerly, but in an aggravated form.

Interrogatory 9. What, in your opinion, was the weight of Mr. Sanders when he first applied to you, or earlier during the year 1902, if you knew him before he applied to you professionally?

Answer. I judged him to be a man of upwards of two hundred pounds at the time of my first becoming acquainted with him.

Interrogatory 10. State if during the time you treated the deceased you learned through him of an injury received by him about the 20th day of March, 1902, in a street railway accident, at Phœnix?

Answer. Upon the first visit of Mr. Sanders to my office, I learned through him of the injury which he said he received in a street railway accident at Phœnix on March 20, 1902. He told me how it occurred and that he was thrown from the car with a gentleman from Michigan who was thrown at the same time. He gave me a history of the accident and of the injuries received. He referred to the event repeatedly thereafter.

Interrogatory 11. State if the deceased, during the time you treated him professionally stated to you the condition of his health and his ability to perform physical labor prior to the time
104 of the injury received in such accident?

Answer. He did.

Interrogatory 12. State whether the deceased gave to you, during the time he was under your treatment, a history of his case and his ability or lack of ability to perform physical labor following the injury and up to the time he applied to you professionally?

Answer. He did.

Interrogatory 13. From the statements made to you by the deceased, as involved in the last three questions, and from the symptoms as disclosed by your examinations and observations of him, what, in your opinion, was the probable originating cause of the trouble from which he was suffering?

Answer. From the history and statements given to me by the deceased of his case, as I have indicated in my answers to the last three questions, and from the symptoms as disclosed by my examinations, and observations of him, in my opinion the probable originating cause of the trouble from which he was suffering was attributable to the injury received in the street railway accident.

Interrogatory 14. From such statements made by the deceased to you as are involved in the last question, from your examinations and observations made of his case during the time he was under your treatment and from any subsequent examinations and obser-
105 vations of his case after you ceased to treat him, what, in your opinion, was the probable originating cause of his death?

Answer. From the statements made by the deceased to me, as involved in the last question, and from examinations and observations made of his case during the time he was under my treatment and from subsequent examinations and observations of his case, in my opinion the probable originating cause of his death was the injury received in the street railway accident.

R. SYLVANUS SLUSHER.

Deposition taken before Walter M. Appel, Notary Public, in the City and County of Denver, State of Colorado, October 15th, 1904. (Filed in the District Court Oct. 20, 1904.)

And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said Court in said entitled cause copies of interrogatories to be propounded to Joseph C. McKee, a witness on behalf of the plaintiff, and his answers thereto, which, reduced to questions and answers, are in words and figures following, to-wit:

106 *Deposition of Joseph C. McKee.*

Title of Court and Cause.

Interrogatory 1. State your name, age and place of residence.

Answer. My name is Joseph C. McKee; nearly fifty-one (51) years of age; my residence is at No. 28 Madison Avenue, Grand Rapids, Michigan.

Interrogatory 2. If you were acquainted with George W. Sanders during his lifetime, state when that acquaintance began, how long it continued and what business relations you had with him?

Answer. I have been acquainted with George W. Sanders for about five years, knowing him very closely, as he was superintendent of a mining property in Arizona in which I am considerably interested.

Interrogatory 3. Were you in the city of Phœnix, Arizona, on or about the 20th March, 1902? If so, state when and how you arrived.

Answer. I was in the City of Phœnix, Arizona, on the twentieth (20th) of March, 1902, arriving there upon the Santa Fe, Prescott & Phœnix train in the evening.

Interrogatory 4. If you state that you arrived in the evening over the Santa Fe, Prescott and Phœnix Railway, state where you left the train.

Answer. I left the Santa Fe, Prescott & Phœnix train
107 at the so-called Capitol Crossing in Phœnix.

Interrogatory 5. What means of conveyance did you take after leaving the train to be conveyed up town, and where did you go?

Answer. I took the electric car at the aforesaid Crossing for the purpose of going to the Hotel Adams in the City of Phœnix.

Interrogatory 6. Name any persons who were with you when you left the train, and state if they took the same conveyance you did?

Answer. Many other passengers took the above mentioned train, and took the same electric car to get down town in the City of Phoenix; among these passengers was Mr. George W. Sanders and his son, Mr. George E. Sanders.

Interrogatory 7. If in answer to previous questions you state that you boarded a street car of the defendant and that George W. Sanders boarded the same car, then state where you and he sat or stood, and if you and he were sitting describe the seat on which you sat and your positions with reference to each other; also positions of others on the car, as far as you know.

Answer. Mr. George W. Sanders and myself became seated on the lateral seat at the front end of the car on the outside, left-hand side, and thus making us face north while the car was headed east. George W. Sanders, son of the deceased, stood on the platform of the car between us and the closed part of the car, holding to the
108 post at the end of the seat that we were occuping. At the opposite side of the car and back of where we were sitting was another lateral seat, facing in the opposite direction, on which one or two persons were sitting, one of whom I am informed was Ed. Turner. Between these two lateral seats, the man in charge of the car passed back and forth and stood while driving and controlling the car. I do not recollect the positions of others upon the car.

Interrogatory 8. If an accident occurred that evening while you were riding upon the car you boarded, describe the accident in detail, and especially what, if anything, happened to George W. Sanders. And in this connection state what, if anything, happened to you and others on the car?

Answer. An accident did occur while we were riding on that car, and soon after we boarded it. After the passengers had boarded the car, it was started at a very high rate of speed. I drew from my pocket three fares, being for George W. Sanders, George E. Sanders and myself and passed the same to George W. Sanders, who in turn handed the same to the man in charge of the car, who stood almost directly back of where George W. Sanders was sitting. After taking the fares so passed up to him, the motorman dropped one of the pieces on the floor between the two lateral seats. He then proceeded to look for the piece of money, stooping and hunting for the money on the floor. Mr. Sanders and I turned slightly in our seats, but still sitting, watching the motorman in his search for the
109 dropped coin, and, while the motorman was so engaged, and Mr. Sanders and I were so sitting, the car ran into a curve in the track, which threw both of us headlong into the street.

Interrogatory 9. If a piece of money was dropped by any one previous to or about the time of the accident, state who dropped it, and what search was being made, if any, for the money and by whom?

Answer. In answer to the seventh interrogatory I have stated where George W. Sanders and myself were sitting on the car. For some distance from where we boarded the car, the track is straight,

but at the East side of the Capitol Grounds the track makes a sharp curve on Adams Street to the South. The motorman, who collected the fares also started the car, and after it had started and run a short distance the motorman dropped a piece of money and proceeded to hunt for the lost piece of money he had dropped. The motorman had been resting on one knee while looking for the coin, and raised himself from that position just as the car reached the curve, but too late to check the speed before striking the curve, the speed of the car being so great when it struck the curve in the track that we were thrown headlong into the street.

Interrogatory 10. If a search was being made for a piece of money by any one, state what position George W. Sanders occupied on the car during such search, whether sitting or standing? And in this connection you may state what your position was at the same time.

Answer. During the search for the lost piece of money by the motorman, Mr. George W. Sanders was sitting in the lateral seat on the left-hand side of the front end of the car, partially turned so as to look over the back of the seat, watching the operations of the motorman in his search for the lost coin. I was occupying the same seat, sitting alongside and facing Mr. Sanders, also watching the efforts of the motorman to recover the lost coin. The position that Mr. Sanders and myself were occupying was this,—both were seated slightly turned, partially facing each other and looking over the back of the seat which we were occupying.

Interrogatory 11. State what caused the accident, if you know, giving the manner of track on which the car was running, whether straight or curved, when the accident occurred, and what control the motorman had over the car at the time of the accident and just previous to the accident.

Answer. After leaving the Capitol Crossing the car ran at a high rate of speed, and at the corner of Adams Street ran into the curve. Just as the car reached the curve the motorman raised from his stooping position, which he had assumed while looking for the coin, and took hold of the controller, but the speed of the car was not slackened at the time it struck the curve, and the result was that both Mr. Sanders and myself were thrown headlong from the car. The motorman had no control whatever of the car just prior to the accident and little, if any, at the time of the accident. At the time the car struck the curve the speed of the car had not been slackened. The accident was caused by the car running into the curve at too high a rate of speed.

Interrogatory 12. In case you have previously answered that said Sanders was thrown from the car, state the distance he was thrown, the manner and the violence, if you know?

Answer. As stated before, Mr. Sanders and myself were thrown from the car, a distance of some eighteen (18) or twenty (20) feet—thrown headlong and with great violence.

Interrogatory 13. If you were thrown from the car at the same time, state the manner of your fall and where you alighted with

reference to where Mr. Sanders fell, giving the manner of your fall as connected with that of Mr. Sanders?

Answer. Mr. Sanders and myself were thrown from the car at the same time. Being thrown headlong and going at such a rate of speed that caused us to be thrown such a distance, it is difficult to explain how we alighted—my impression is that Mr. Sanders was thrown on top and over me when we fell.

Interrogatory 14. If you have not before stated, you may now state at what point in the track the accident occurred, whether on a curve or on a straight track?

Answer. The accident occurred on the curve at the corner
112 of the Capitol Grounds, as I understand it. It did not occur upon the straight track.

Interrogatory 15. If you have stated that the accident occurred at a curve in the track, state the direction from the car Mr. Sanders landed?

Answer. The car being east bound, and running at a rapid rate upon straight track; striking a curve to the south, Mr. Sanders and myself were thrown in an easterly direction.

Interrogatory 16. Compared with the speed at which the car was running before state what its speed was at the time of the accident, or just previous to entering the curve?

Answer. The car was running at a rapid rate of speed, upon a straight track east bound, and its speed was not checked at all until after we were entering the curve.

Interrogatory 17. Who was in charge of the car, if you know, stating whether one or more persons, and the acts performed by such?

Answer. I do not know the name of the person in charge of the car. There was but one person in charge of the car. I would say he was motorman and conductor, for he collected the fares of passengers and ran and operated the car; letting on and shutting off the electric current and handled the brake in stopping the car, and no other person took any part in the running of the car to my knowledge.

Interrogatory 18. If in answer to the last question you
113 state that but one person was in charge and acting as motorman and conductor, you may state what observation you made as to what he was doing at about the time of the accident, stating whether he had hold of the current brake or otherwise in control of the electric current and car?

Answer. Just prior to the accident the man in charge of the car was stooping over, looking on the floor for the dropped coin. I was watching him, and the last thing I saw before I was thrown was this man raising and reaching for the handle of the controller.

Interrogatory 19. At and about the time of the accident, state fully what the motorman was doing, giving his position and what he was doing at and about the time of the accident?

Answer. In the last answer I have stated what the motorman was doing at about the time of the accident; without having the same re-written here again, I wish my answer to the last to be treated as

answer to this question as fully as if it was repeated here. I was in a position to see what he was doing. Mr. Sanders and I sat on the lateral seat, outside the car, in the front where the motorman was operating the car, with our backs to him, and when he dropped the piece of money and began his search for it, we both turned in our seats sufficiently to see what he was doing, and we were so turned slightly, and sitting, when the car ran into the curve and threw us headlong to the ground.

114 Interrogatory 20. Are you accustomed to riding upon electric street cars? If so, for how many years, and are you able to give judgment as to the speed at which a car upon which you are riding is running. If you have had other experience in riding upon steam or other cars state it.

Answer. I have been accustomed to riding upon electric street cars ever since they first came into use. I have had upwards of fourteen years' experience in railroading, and have some ability to judge fairly as to the speed at which a car is moving.

Interrogatory 21. If you have answered that you are able to judge of the speed of a car on which you are riding, state the speed at which this car, in your judgment, was running before and at time of accident?

Answer. I believe this electric car was running fully eighteen miles per hour at the time of the accident.

Interrogatory 22. If you know of the deceased being injured at the time of this accident, state the fact in that respect.

Answer. I know that George W. Sanders was seriously injured at the time of this accident. We were both so seriously injured that it made it impossible for us to accomplish certain work for which I had made this trip to Arizona.

Interrogatory 23. State any complaints or exclamations of pain, if any, made by the deceased at the time and soon after the

115 accident.

Answer. Complaints and exclamations of pain by the deceased, immediately after the accident, were many and frequent. I do not now remember just what he said.

Interrogatory 24. What complaints or exclamations of pain did he make during the same evening after arriving at the hotel and during that night?

Answer. Mr. Sanders was badly cut and bruised. He complained of great pain in his breast. As well as that he was bruised and sore.

Interrogatory 25. What, if anything do you know of his suffering from the fall the next and subsequent days following the accident? State fully.

Answer. The day following the accident, Mr. Sanders and myself were both so sore and stiff from the fall that it was impossible to get about or do any work. I know that he suffered greatly.

Interrogatory 26. If in answer to the second interrogatory you state that Mr. Sanders was in the employ of the New Vulture Mining Company, you may state what position you have heretofore held

and what you now hold in said company, stating when and how long you held different positions?

Answer. Mr. Sanders was in the employ of the New Vulture Mining Company. I was manager of the New Vulture Mining Company for several years, and am at the present time one of the Board of Directors of said Company. I took charge of the Vulture
116 property in April, 1897.

Interrogatory 27. When did the deceased go into the employ of the New Vulture Mining Co., how long did he continue and in what capacity was he employed, and whether such employment was continuous?

Answer. George W. Sanders entered the employ of the New Vulture Mining Company on or about May 4th, 1898, as engineer. On or about November 10th, 1898, I left the Vulture Mine for home, leaving Mr. Sanders in charge as superintendent. Mr. Sanders was in the employ of the New Vulture Mining Company from May, 1898 until the time of his death.

Interrogatory 28. State the character of the physical labor he was called upon to perform, and did perform with your company, in the capacity in which he was employed.

Answer. The character of the physical labor that Mr. Sanders was called upon to perform and did perform for our Company, was, at times, quite strenuous, embracing as it did the climbing up and down shafts, and running about through the different parts of the mine, as well as considerable heavy labors in other directions as engineer.

Interrogatory 29. State fully and particularly the character of labor you saw him personally perform with your company, giving dates, if you can, and his power of endurance, prior to the accident?

Answer. During several visits to the Mine, covering different periods, in some instances a number of weeks, Mr. Sanders, in company with myself, put in many days of very hard labor
117 together, both in the line of the necessary work in operating the steam plant and the cyanide plant, as well as the climbing in and out of the shafts and stopes in the mine where this work was being carried on. The character of this labor called for considerable physical strength, which he was able to perform.

Interrogatory 30. State what personal observation you made of his ability, physical strength and endurance to perform manual labor without fatigue prior to the accident in question?

Answer. After this accident took place I had occasion to be with him upon the property several times, and found that he was so badly injured that it was impossible for him to do such work as we had formerly undertaken. He was simply confined to over-seeing, without being able to do the work himself as before the accident.

Interrogatory 31. In his duties about his employment with your company you may state what physical strength and endurance was required to fill the place properly, and whether the deceased, prior to the accident in question, was able to and did perform such duties?

Answer. The duties falling upon Mr. Sanders in his employment with the New Vulture Mining Company, required considerable

physical strength and endurance, which he was able to perform and did perform prior to the accident.

Interrogatory 32. What knowledge have you as to his
118 ability to perform the duties of his employment after the accident in question, stating whether he was after the accident able to perform the labor required of him to discharge his duties and employment?

Answer. After the accident Mr. Sanders was not physically able to perform the labors that were expected of him. He could simply oversee the work without taking hold and doing more or less of it personally.

Interrogatory 33. If deceased continued in the employ of the company after the accident, and you have stated that he did not perform the labor formerly done by him state how such labor was performed, whether by others and what did deceased continue to do?

Answer. Mr. Sanders did oversee the work and remained in charge of same after the accident until about the time of his death. After the accident he was unable to do the manual work which he had formerly done.

Interrogatory 34. Describe the accident in a continuous narration of incidents, beginning with the starting of the street car after boarding at the Santa Fe crossing to and including the starting of the car after the accident, detailing the acts of the motorman, the deceased, yourself and others, where each was sitting or standing, if partly sitting and standing, the cause of the accident, describing the acts of the motorman, his failure in respect to having the car under control, if he failed, what happened to the deceased
119 and others, including yourself, the positions occupied by the various persons on the car, manner thrown from the car, manner of landing if thrown and whether the persons thrown got up and on to the car without assistance, and if with assistance who assisted? Give as much detail and name as many incidents as possible.

Answer. On boarding the street car at the Santa Fe Crossing, I took the seat on the lefthand side at front end of car, facing outward. Mr. George W. Sanders occupied the seat at my left and next to me. The car was quite well filled with passengers, and the man in charge of the car started the car at a high rate of speed, and turned about to begin the collection of fares. I drew three fares from my pocket and handed the same to Mr. George W. Sanders, for him to hand to the man in charge of the car. In taking the money from Mr. George W. Sanders, one piece or coin was dropped upon the floor of the car. The motorman stooped to find this piece of money and spent some time in doing so, the car running at a high rate of speed during this time. Mr. Sanders and myself turned slightly, facing each other, and looked over the back of the seat to see what success the man was making in his search for the lost coin. The position that this man occupied at that time was that he was down, resting upon one knee, looking about on the floor for the lost coin. He raised from this position just as we reached the

curve at which the accident happened. He did not have
120 time to shut off the current before we struck the curve. Mr. Sanders and myself were thrown violently head-long into the street and badly injured. At the time the car struck the curve Mr. Sanders as well as myself were both seated, but partially turned in our position so that we could watch the operations of the motorman.

The accident took place in the evening while it was quite dark. It was apparent that the motorman did not realize what speed he was making, while fully engrossed in looking for the lost coin, and apparently did not realize that we were nearing the curve in the track. At any rate made no provision to slow down before reaching the curve. Mr. Sanders and myself were thrown head-long a distance of something like eighteen or twenty feet and were both badly bruised. The day following the accident we were not able to get about or leave the Hotel, but the following day we returned to the Mine, hoping that we might accomplish some of the work that I had gone to the Mine to attend to. Upon reaching the Mine, we found that neither of us were in physical condition to attend to the matters, and, as we were both getting worse instead of better physically, I left for home without being able to accomplish the work that I had anticipated.

At the time of the accident, the car was just entering the curve at Adams Street and was running at a high rate of speed—I think eighteen or more miles per hour.

121 I saw Mr. Sanders at the mine and elsewhere on several different occasions after the accident, and know from personal observation that he was badly injured and that he was, after the accident, unable to perform the duties, particularly those requiring physical exertion, that he had previously performed.

JOSEPH C. McKEE.

Deposition taken before Hugh E. Wilson, Notary Public in the county of Kent, State of Michigan, October 11th, 1904.

(Filed in the District Court Oct. 18, 1904.)

And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said Court in said entitled cause copies of interrogatories to be propounded to Dr. John W. Foss, Dr. O. E. Plath, Dr. E. Payne Palmer, and William T. Barr, witnesses on behalf of the plaintiff, and their answers thereto, which, reduced to questions and answers, are in words and figures following, to-wit:

122 *Deposition of Dr. John W. Foss.*

Title of Court and Cause.

Interrogatory 1. State your name, residence and profession?

Answer. My name is John W. Foss; my residence is Phoenix, Arizona; and my profession is that of physician and surgeon.

Interrogatory 2. If you state you are a physician and surgeon, state when and from what medical school you graduated?

Answer. I graduated from the Harvard University Medical School at Boston, Massachusetts, in the year 1899, and in the year 1890 I graduated from the Vermont Medical College.

Interrogatory 3. How long have you practiced your profession in Phoenix, and how long altogether?

Answer. I have practiced my profession at Phoenix during eight years last past, and in all, have practiced my profession seventeen years.

Interrogatory 4. Did you know George W. Sanders, now deceased, during his lifetime? If so, state when you first met him, and if you made a medical examination of him then?

Answer. I did know George W. Sanders, deceased, during his lifetime; I met him the first time on the 3rd day of June, 1903, when I made a medical examination of him.

123 Interrogatory 5. Did the deceased then or afterwards become your patient? If so, state the time during which he was under your charge?

Answer. Yes, the deceased became my patient in January, 1904, and continued until his death.

Interrogatory 6. What was the disease from which he was then suffering?

Answer. His disease was dilation of the right heart.

Interrogatory 7. If you answer that he was suffering from dilation of the heart, state which side, if you can?

Answer. As I have stated in the last question, it was the right side of his heart that was dilated.

Interrogatory 8. What clinical evidences were present which led you to conclude there was dilation of the heart? Describe fully.

Answer. The clinical evidences were increasing breathlessness, palpitation, epigastric oppression, nausea, vertigo, cyanosis, area of heart dullness increased to the right, small rapid pulse, all of which continued until his decease; there was hypertrophy and dropsy well marked later on with headache, dizziness, dry cough, noises in the head, great discomfort when lying on left side, and small pulse weak and irregular.

Interrogatory 9. If deceased continued under your treatment, describe his physical condition down to the time you ceased to treat him?

Answer. The same physical condition was present until
124 the decease of the patient, except as time passed on, the evidences became more marked.

Interrogatory 10. Did the deceased, during the time he was under your treatment, give you the history of his case as connected with his illness?

Answer. He did.

Interrogatory 11. Did he relate to you an accident in which he received injuries while riding upon a street car in Phoenix, on or about the 20th March, 1902?

Answer. He did.

Interrogatory 12. Did he relate the manner of accident and in-

juries received in this accident by him, and his ability or lack of ability, following the accident, to perform physical labor, and his state of health following it?

Answer. He did.

Interrogatory 13. Did he state to you his state of health and his ability to perform physical labor prior to the accident?

Answer. He did.

Interrogatory 14. From such statement and history of his case, before and after the accident, and of the manner of the accident and injury, and the clinical evidences present when his case came to your attention, what, in your opinion, was the probable originating cause of the dilation or lesion?

Answer. The probable originating cause of the dilation
125 or lesion was an injury received by Mr. Sanders in a street railway accident at Phoenix, stated to be on the 20th day of March, 1902.

Interrogatory 15. State, in your opinion, the probable manner in which dilation of the heart was produced by the accident and fall such as the deceased described as happening to him?

Answer. Probably the heart was filled with blood and expulsion about to take place as he struck the ground, the concussion causing ruptures of the valves between the right auricle and the right ventricle.

Interrogatory 16. If you have testified that the deceased was suffering disease of the heart, state if he stated when it first appeared?

Answer. Mr. Sanders did state to me when this trouble with his heart first appeared.

Interrogatory 17. When did he say it first appeared, and if he associated its commencement with some injury received by him, state what he said of the injury, its manner and when it happened?

Answer. He stated that it appeared soon after the injury received by him in the street railway accident in March, 1902; he stated in substance that he was riding upon the street-car and that the same ran into a curve in the track and threw him and another man sitting with him to the ground some distance from the car, and he
126 related the manner in which the fall occurred; and that following the accident he was bruised over the right breast, also about the waist, and one of his arms was lamed, and that he spat blood.

Interrogatory 18. If in answer to the 4th interrogatory you have testified that you made a physical examination of the deceased at that time—on your first meeting him, state where this occurred and the occasion and purpose of the examination, and who was present, if others?

Arizona. This first examination was made on the 3rd day of June, 1903; it occurred in the office of Doctor Dodsworth at Phoenix; and the occasion for such examination was the meeting of the Board of Pension Examiners, and was made on account of an application of George W. Sanders to the government for an increase of pension; I was President of the Board of Examiners, and the other two mem-

bers were Doctors Dodsworth and Stroud, but whether Doctor Stroud was present at this examination I am not certain at this time.

Interrogatory 19. What was the condition of his heart at that time with respect to palpitation and dilation?

Answer. He was suffering from a marked case of dilation, severe palpitation following slight exertion; there was dizziness and cyanosis.

Interrogatory 20. What statement, if any, did he make on this occasion as to when this trouble with his heart first appeared?

Answer. On this occasion he stated that it followed and
127 appeared for the first almost immediately after the street railway accident in March, 1902.

Interrogatory 21. How did he come to make the statement, and why?

Answer. He made the statement last above, because one of the regular questions to be asked upon such an examination would call for the answer requiring the applicant to give the date and cause of any disability.

Interrogatory 22. Give the date of the decease of Mr. Sanders, if you can?

Answer. Mr. Sanders died on the 6th day of February, 1904.

Interrogatory 23. State if you held a post mortem examination on the body of the deceased, Mr. Sanders, and if so, who assisted you?

Answer. I did hold a post-mortem examination on the body of Mr. Sanders, and was assisted by Doctors Plath, Palmer, Slusher, and Noel, the latter two having since removed from Phoenix.

Interrogatory 24. Describe the anatomical condition of the heart of deceased as disclosed by your post mortem examination?

Answer. The heart was abnormally large, its walls abnormally thin, the muscles abnormally soft, the cavities much dilated, some of the valves were incompetent, there was a scar and small bands, showing that nature had attempted to repair the injury and
128 there was an excessive amount of pericardial fluid present.

Interrogatory 25. Describe the anatomical condition of any other organ as disclosed by the post mortem examination?

Answer. The pancreas was adhered to the intestine.

Interrogatory 26th. Based upon the post mortem examination, to what do you attribute the immediate cause of death of Mr. Sanders?

Answer. The immediate cause of death was dilation of the heart.

Interrogatory 27. Describe the anatomical evidences, as disclosed by the post mortem examination, from which you conclude the cause of death, as testified to by you to the last interrogatory?

Answer. The anatomical evidence disclosed from which I conclude as to the cause of death are given in my answer to interrogatory 24.

Interrogatory 28. Based upon the history of his case, as related to you by the deceased, the clinical evidences present when you first examined him and during the time he was under your treatment, and the observations made of the organs at the post mortem examination of the body, what, in your opinion, was the probable originating cause of death?

Answer. In my opinion, the probable originating cause of the death of Mr. Sanders was the injury received in the street railway accident.

129 Interrogatory 29. Doctor: Assumed that a man 60 years of age, strong and healthy for a man of his years, whose duties at the Vulture mine 16 miles from Wickenburg, for several years immediately preceding an accident and injury later on stated, require of him, besides overseeing and directing the manual labor, the keeping of the books, the lifting of pans and settling basins about the cyanide plant, going about all over the mines and buildings, down in the mines through inclines to a depth of 450 ft., the climbing 200 feet and more perpendicular ladders, through tunnels and levels over ore piles, while superintending the work; taken part in timbering and all kinds of carpenter work about the mines, fires the engine, sharpens tools, shoes the horses and does other blacksmithing required about the mines; goes back and forth from Wickenburg with loaded teams and discharges the loads, carries water in 5 gallon pail 500 feet for domestic purposes, and windlasses ore from shafts; a man, who for many years prior and up to the 20th March, 1902, had been engaged in manual labor of various kinds and all of which labor and duties he performed without apparent fatigue, his weight about 200 lbs.

While riding upon the front lateral seat of the open part of an electric street car in Phoenix, sitting beside a man traveling with him on the same seat, on the 20th March, 1902, the car enters a sharp curve in the track where it turns into another street, while

130 running 10 miles or more per hour, the two men are thrown into the air and come to the ground in a mix-up 15 feet from the car, the deceased falling upon his back and the other man falling upon him; as soon as able to speak he complains of injury of the hip and chest; the same night he spat blood; the next day he was black and blue over the chest and hip; suffered continuous pain and expressed fear of internal injury. The next day, 22d, accompanied by the man who was thrown with him, he returned to Wickenburg, thence by team to the Vulture mine. His left arm is lame, breast over the heart is bruised and discolored which continued long after discoloration from bruises on other parts of his body had disappeared; he complains of internal pain at the waist line to side of the navel; has heart palpitation, spat blood, and vomited clots of blood; the next day, 23d March, he drives to Wickenburg in the afternoon and next morning returns to camp where he required assistance to help him from the conveyance to the house; immediately takes to his bed; is suffering from pain about his heart, at the waist line and shoulder and from suffocation; was confined to his bed two weeks and on getting up and out it is discovered that physical exertion brings on heart palpitation, choking, suffocation and if persisted in produces vomiting.

During the month of April following the accident he went into the mine and not returning as soon as expected a man is sent who finds him leaning against the wall of an incline tunnel, ex-

131 hausted and helpless and with the assistance of another the two bring him out and to the house, after which he is not

permitted to go alone. He can no longer perform labor as before the accident, because of exertion producing palpitation of the heart, choking and suffocation; the bed chamber of himself and wife is changed to downstairs because the climbing of the stairs produces palpitation; his sleep when lying down is often interrupted by choking and suffocation and is relieved only by his wife, at times others assisting her, raising him to a sitting position; the driving of a team from camp to Wickenburg or back, so exhausts him at times that he is required to go to bed for hours and requires the administration of restoratives before he can get about again.

The patient grows worse as time passes, the character of his symptoms and suffering being the same but more aggravated and is produced with less exertion as time passes. For sometime strychnine and other drugs seem to control the heart action so the patient can do things not requiring much exertion, but drugs finally fail to have the effect of quieting the palpitation; he gradually grows worse until December, 1903, his limbs and feet begin to swell and continue to swell and grow worse until his death on the 6th day of February, 1904, the palpitation, suffocation, choking and vomiting coming on soon after the accident and continued down to his death, becoming more violent and frequent as time passed until the
132 end; he was 62 years of age when he died.

These facts assumed, Doctor, what, in your opinion, was the probable originating cause of the trouble from which he was suffering and for which you treated him?

Answer. My answer to this question will be and is the same as my answer to the last.

Interrogatory 30. Doctor, assuming the same state of facts as in the last preceding question, what, in your opinion, was the probable originating cause of death?

Answer. I make the same answer to this question as to the last two.

Interrogatory 31. Doctor, in addition to the same facts assumed in interrogatory No. 29, it is further assumed that a post mortem examination of the heart of this man discloses both chambers of the right heart abnormally large, the muscle fibres soft and flabby with tendency to tear easily when putting on tension, and marked atrophy present, what, in your opinion, was the probable originating cause of death?

Answer. I make the same answer to this interrogatory as I have made to the last.

Interrogatory 32. Doctor, to what probable originating cause would you attribute the adhesion of the pancreas, as disclosed by the post mortem examination?

Answer. I would attribute the adhesion of the pancreas
133 to injury received in the street railway accident.

Interrogatory 33. What clinical evidences, if any, were there present in the history of the case, as indicated in interrogatory No. 29, which leads you to the conclusion as to the cause for this adhesion?

Answer. The clinical evidences which lead me to the conclusion

reached in my answer to the last question was the persistent soreness in the left hypochondriac region about the waist line following the accident, as disclosed by a portion of the history of the case incorporated in direct interrogatory 29.

Cross-interrogatories Propounded to Dr. J. W. Foss and His Answers Thereto.

Cross-interrogatory 1. State whether or not, you made a physical examination of George W. Sanders, now deceased at the time the said Sanders made his application to the U. S. Government for an increase of his pension, and if so state what the physical condition of the said Sanders was as disclosed by such examination, and if you made a report of your examination of said Sanders, please give in detail such report as made to the U. S. Government or the Pension Department thereof, and date of such examination.

Answer. His physical condition, weak, hypertrophy of the heart, dilation of right heart, unable to endure exertion, slight ex-
134 ertion causing dizziness, heart palpitation, difficult breathing. The physical condition of the deceased as disclosed by the post-mortem examination was generally good, except the heart, and the resulting conditions following the heart disease, there being a dropsical condition which, of course, resulted from the condition of his heart.

The report made on the case of Mr. Sanders to the pension department of the United States government was sent in, a synopsis only being retained as a record here. This synopsis shows that the applicant, Mr. Sanders, reported his postoffice address as Wickenburg, Arizona, and stated that his lungs had been affected since 1862, which he attributed to measles, and he stated that the trouble with his heart dated from the 20th day of March of the previous year, this examination being held on the 3rd day of June, 1903, and that the condition of the heart was due to an accident received from being thrown from a street railway. The disabilities recorded by the Board in this synopsis shows in the applicant decreased respiratory murmers over upper lobe of right lung, few bronchial rales over upper lobe of right lung. Heart: apex impulse visible one inch below and three inches internal to nipple line; a very pronounced impulse visible in the left superior clavicular; also a less one in the right; also in the left infra-clavicular spare beat produced an impulse over entire left chest; dullness at upper border third rib, nipple line and right border of sternum; consid-
135 erable hypertrophy with apparent dilation; heart beat very irregular, second sound much prolonged; considerable edema, no cyanosis. Mr. Sanders said he had cyanotic attacks at irregular periods.

As result of this examination the Board denied any rating for increase of pension on account of the lungs, but gave a rating of seventeen-eighteenths on account of the heart which means and is understood in the Pension Department as practical and total disability.

Cross-interrogatory 2. If you state in answer to the direct interrogatories that you made a post mortem examination of the — George W. Sanders, state whether or not such examination disclosed a condition of his heart commonly known as fatty degeneration of the heart.

Answer. There was present such condition.

Cross-interrogatory 3. State whether or not you found his heart muscles paler and softer than normal.

Answer. Yes.

Cross-interrogatory 4. State whether or not your examination of the heart of the said Geo. W. Sanders disclosed any rupture of the heart valves or any other portion of the heart or of the arteries leading into the heart.

Answer. There was rupture of the tricuspid valve of the heart.

Cross-interrogatory 5. State whether or not you found any external evidences indicating any injury to the heart.

136 Answer. No.

Cross-interrogatory 6. State if you know, from such examination, whether or not, Mr. Sanders' heart differed from that of another heart which is dilated from fatty degeneration where there has been no history of injury.

Answer. Yes, the examination did disclose a difference from that of another heart dilated from fatty degeneration without history, in that there was a scar caused by traumatism or injury, causing lesion and indicating quite clearly that there has been injury.

Cross-interrogatory 7. State whether or not, dilation of the heart arises only from external injuries.

Answer. No.

Cross-interrogatory 8. State whether or not, the condition of the heart of George W. Sanders, as disclosed from your post mortem examination of the same, may have arisen from fatty degeneration, endocarditis, or ulceration, without external violence.

Answer. No. There was present on examination of the heart evidence of an injury as the moving cause.

Cross-interrogatory 9. Can you state positively that the conditions disclosed by your post mortem examination or autopsy on the body of George W. Sanders, were due to the injury claimed to have been received by him in falling or being thrown from the car of the defendant, the injury if any having occurred in March, 1902,

137 and your examination having been made in May 1903, and if you answer this in the affirmative, give your reasons for arriving at such conclusion.

Answer. No, not positively.

Cross-interrogatory 10. State whether or not you ever saw a case, where on autopsy or other examination, a heart was found to be dilated or a lesion of the heart to exist and such conditions were caused to exist or be by reason of external violence, and such external violences to be other than *perfatory* wounds from bullet, knife, broken rib or broken sternum.

Answer. No. This was my first autopsy on a case exactly like this.

Cross-interrogatory 11. If you say in answer to the last interrogatory that you did see such cases, state whether or not such cases are common or extremely rare, and if you know, give list of authorities which detail any such case as referred to in the last interrogatory.

Cross-interrogatory 12. If you answer the 10th cross interrogatory in the affirmative, state whether or not such condition of the heart was due to lift or muscular exertion instead of blow.

Having answered the tenth cross interrogatory in the negative, answers to the eleventh and twelfth cross interrogatories are not required.

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Cross-interrogatory 13. State, if you know, whether or not the heart is usually very intolerant of such an injury as dilation or lesion, and whether or not such injuries to the heart resulting in dilation or lesion thereof usually result quickly fatal, and do they not cause great shock, faintness, difficult breathing and give rise to a feeling or sense of impending death.

Answer. That depends upon the constitution of the individual and the degree and extent of the injury.

Cross-interrogatory 14. If in answer to the direct interrogatories you state that in your opinion the said George W. Sanders' condition as disclosed by your post mortem examination, was due to the injury claimed to have been caused by his falling or being thrown from the car of the defendant, would your opinion to that effect be modified, if it were shown that the said Sanders complained of rheumatism for several years prior to the alleged injury, that he had admitted having chest troubles long prior to the injury, that he immediately after the injury rode on a car for a mile and a half, then walked one block, was able to be about the next day, and on the succeeding day rode to a mine over seventy miles from the place of injury, and did not consult a physician till the fifth day after his injury, and that then upon examination, the doctor did not discover any recent heart trouble.

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Answer. No. There was no evidence of a rheumatic heart disclosed by the post mortem examination and there was no other evidence found in the examination to indicate that the troubles indicated by this question had existed.

Cross-interrogatory 15. State, if you know, whether or not the heart is more tolerant of lesions caused by disease than those caused by external violence or injury.

Answer. That would depend upon the nature and extent of a disease as well as the nature and extent of an injury and the resistive powers of the person.

Cross-interrogatory 16. State, whether or not, in your opinion, the fact that the said Sanders lived twenty-three months after injury, suggest disease rather than injury as the probable cause of heart dilation.

Answer. No.

Cross-interrogatory 17. State whether or not you found the said George W. Sanders, upon your examination after his death, to have diseased lungs.

Answer. No. The post-mortem examination did not disclose diseased lungs. There was a general edematous (dropsical) condition of the entire system a result which follows dilation.

JOHN W. FOSS, *M. D.*

Deposition taken before Thos. J. Prescott, Notary Public,
110 in the County of Maricopa, Territory of Arizona, December 10, 1907.

Deposition of Dr. O. E. Plath.

Interrogatory 1. State your name, residence and profession?

Answer. My name is Otto E. Plath; I reside at Phoenix, Arizona; and am a physician and surgeon.

Interrogatory 2. If you state that you are a physician and surgeon, state when and from what medical school you graduated?

Answer. I graduated from the Miami Medical College of Cincinnati, Ohio, in 1896.

Interrogatory 3. How long have you practiced your profession at Phoenix and how long altogether?

Answer. I have practiced my profession at Phoenix during the past eleven years; all told, I have practiced it twelve years.

Interrogatory 4. Did you know George W. Sanders, now deceased, during his lifetime?

Answer. I did know Mr. Sanders.

Interrogatory 5. Were you present at a post mortem examination on the body of a man said to be that of George W. Sanders on the 6th day of February, 1904, conducted by Dr. Foss, at Phoenix?

Answer. I was present at the post-mortem examina-
111 tion held by Doctor Foss.

Interrogatory 6. If you answer that you were present state who identified the body, and what part you took in the examination?

Answer. I knew the body of the deceased, and I assisted Doctor Foss in making the examination.

Interrogatory 7. Describe the anatomical condition of the heart of the deceased as disclosed by the post mortem examination, describing any abnormal or unhealthy conditions?

Answer. The anatomical condition disclosed an excessive amount of pericardial fluid present. The heart, abnormally large, its valves abnormally thin, the substance of the heart muscles abnormally soft and friable, the cavities dilated, some of the valves incompetent, the Mitral and Tricuspid valves were incompetent, one of the Tricuspid valves showed small bands of adhesion to the lower wall of the heart.

Interrogatory 8. Describe the anatomical condition of the pancreas and its connections pointing out any abnormal conditions?

Answer. The pancreas was enlarged at the caudal extremity and was adherent in its extremity to the intestine.

Interrogatory 9. Based upon this post mortem examination, to what do you attribute the immediate cause of death?

Answer. The immediate cause of death was acute dilation of the heart.

142 Interrogatory 10. Describe the anatomical evidences, as disclosed by the post mortem examination, from which you conclude as to the cause of death, as testified by you in your last answer?

Answer. The thin wall of the ventricle and the abnormally large size of the ventricle led me to the conclusion stated in my last answer.

Interrogatory 11. Doctor, assumed that the body identified as that of George W. Sanders, deceased, on which this post mortem examination was held, was a man 60 years of age, strong and healthy for a man of his years, whose duties at the Vulture mine 16 miles from Wickenburg, for several years immediately preceding an accident and injury later stated, require of him, besides overseeing and directing the manual labor, the keeping of the books the lifting of pans and settling basins about the cyanide plant, going about all over the mines and buildings, down in the mines through inclines to a depth of 450 feet, the climbing 200 feet and more perpendicular ladders, through tunnels and levels over ore piles, while superintending the work; takes part in timbering and all kinds of carpenter work about the mines, fires the engine, sharpens tools, shoes the horses and does other blacksmithing required about the mines; goes back and forth from Wickenburg with loaded teams and discharges the loads; carries water in five gallon pail 500 feet for domestic purposes, and windlasses ore from shafts—a man who for

143 many years prior to and up to the 20th March, 1902, had engaged in manual labor of various kinds and all of which labor and duties he performed without apparent fatigue, his weight about 200 lbs.

While riding upon the front lateral seat of the open part of an electric street car in Phoenix, sitting beside a man traveling with him on the same seat, on the 20th March, 1902, the car enters a curve in the track where it turns into another street while running 10 miles or more per hour, the two men are thrown into the air and come to the ground in a mix-up 15 feet from the car, the deceased falling upon his back and the other man falling upon him; as soon as able to speak he complains of injury of the hip and chest; the same night he spat blood; the next day he was black and blue over the chest and hip, suffered continuous pain and expressed fear of internal injury. The next day, 22d, accompanied by the man who was thrown with him, he returned to Wickenburg, thence by team to the Vulture mine. His left arm is lame, breast over the heart is bruised and discolored which continued long after discoloration from bruises on other parts of his body had disappeared; he complains of internal pain at the waist line at the side of the navel; has heart palpitation, spat blood and vomited clots of blood; the next day, 23d March, he drives to Wickenburg in the afternoon and next morning returns to camp where he required assistance to help him from the conveyance to the

144 house and immediately takes to his bed; is suffering from pain about his heart, at the waist line and shoulder, and

from suffocation; was confined to his bed two weeks and on getting up and out it is discovered that physical exertion brings on heart palpitation, choking, suffocation and if persisted in produces vomiting.

During the month of April following the accident he went into the mine and not returning as soon as expected a man is sent who finds him leaning against the wall of an incline tunnel, exhausted and helpless and with the assistance of another the two brought him out and to the house, after which he was not permitted to go alone. He can no longer perform labor as before the accident because of exertion producing palpitation of the heart, choking and suffocation; the bed chamber of himself and wife is changed to down stairs because the climbing of the stairs produces palpitation; his sleep when lying down is often interrupted by choking and suffocation and is relieved only by his wife, at times others assisting her, raising him to a sitting position; the driving of a team from camp to Wickenburg, or back, so exhausts him at times that he is required to go to bed for hours and requires the administration of restoratives before he can get about again.

The patient grows worse as time passes, the character of his symptoms and suffering being the same but more aggravated and
145 is produced with less exertion as time passes. For some time strychnine and other drugs seem to control the heart action so that the patient can do things not requiring much exertion, but drugs finally fail to have the effect of quieting palpitation; he gradually grows worse until December, 1903, his limbs and feet begin to swell and continue to swell and grow worse until his death on the 5th day of February, 1904, the palpitation, suffocation, choking and vomiting coming on soon after the accident and continued down to his death, becoming more violent and frequent as time passes until the end; he was 62 years of age when he died.

These facts assumed, Doctor, what, in your opinion, was the probable originating cause of death? And in giving your answer please disregard the anatomical conditions disclosed by the post mortem examination.

Answer. I attribute the originating cause of death to the injury of the heart received in the street railway accident.

Interrogatory 12. Doctor, again assuming as facts the history, and case as stated in the last interrogatory, and in addition thereto the anatomical condition of the body and organs of the deceased as disclosed to you by the post mortem examination, to what probable proximate cause would you attribute death?

Answer. I would attribute the death to the injury received in the same accident resulting from being thrown from the
146 street car.

Cross-interrogatories Propounded to Dr. O. E. Plath and His Answers Thereto.

Cross-interrogatory 1. If you answer the fourth interrogatory in the affirmative, state whether or not you treated the said George W. Sanders professionally, and examined him physically, prior to per-

forming the autopsy and post mortem examination on his body after his death.

Answer. No.

Cross-interrogatory 2. State whether or not you know of your own knowledge, whether the said George W. Sanders suffered in his life time from irregular action of the *action*, or from dilation of the heart, or from leaky valves of the heart, or from fatty degeneration of the heart.

Answer. I do not.

Cross-interrogatory 3. Assuming the facts set forth in direct interrogatory No. 11, and keeping in mind the facts therein set forth relating to the deceased the day after receiving the alleged injury going to Wickenburg and then by stage to the Vulture mine (a distance of some seventy miles all told) and not consulting a physician until the fifth day after receiving the injury, does not those facts suggest a preexisting heart trouble, rather than a dilation or lesion of the heart caused by external violence.

147 Answer. No.

Cross-interrogatory 4. State whether or not, a dilation or lesion of the heart resulting from external injury or violence usually results quickly fatal.

Answer. It does not. That would depend upon the extent or violence of the lesion and upon the resisting and recuperative powers of the individual.

Cross-interrogatory 5. State whether or not, in your opinion, the fact that the deceased lived twenty three months after the injury complained of, suggests a dilation or lesion of the heart due to disease, rather than to sudden external violence.

Answer. No, it does not.

Cross-interrogatory 6. State if you know whether or not the heart is more tolerant of lesions caused by disease than those caused by external violence or injury.

Answer. That also would depend upon the character of the disease and the character of the external violence and the resistive powers of the individual.

Cross-interrogatory 7. State whether or not you ever saw a case, where a person was suffering from dilation or from lesion of the heart caused by external violence, other than *perfatory* wounds from bullet, knife, broken rib or broken sternum, and if you say you did give details of such case, and state whether or not such a case

148 is detailed by any competent authority.

Answer. I have in principle. A young man 20 years of age not accustomed to severe exertion had taken a 50 mile ride on a heavy bicycle. Soon after he was taken with difficulty in breathing, palpitation, bluing of the lips, a feeling of extreme discomfort which persisted for a considerable time and from which he has not yet fully recovered after several years.

O. E. PLATH.

Deposition taken before Thos. J. Prescott, Notary Public, in the County of Maricopa, Territory of Arizona, December 10, 1907.

Deposition of Dr. E. Payne Palmer.

Interrogatory 1. State your name, residence and profession?

Answer. My name is E. Payne Palmer; my residence, Phœnix, Arizona; and my profession is that of physician and surgeon.

Interrogatory 2. If you state that you are a physician and surgeon, state when and from what medical school you graduated?

Answer. I graduated from the Barnes Medical College at St. Louis, Missouri, in the year 1898.

Interrogatory 3. How long have you practiced your pro-
140 fession at Phœnix, and how long altogether?

Answer. I have practiced my profession at Phœnix seven and one-half years, and in all, nine and one-half years.

Interrogatory 4. Did you know George W. Sanders, now deceased, during his lifetime?

Answer. I was slightly acquainted with George W. Sanders during his lifetime.

Interrogatory 5. Were you present at a post mortem examination on the body of a man said to be that of George W. Sanders on the 6th day of February, 1904, conducted by Dr. Foss, at Phœnix?

Answer. I was present at the post-mortem examination upon his body held by Doctor Foss and I assisted.

Interrogatory 6. If you answer that you were present, state who identified the body, and what part you took in the examination?

Answer. I knew it to be the body of George W. Sanders.

Interrogatory 7. Describe the anatomical condition of the heart of the deceased as disclosed by the post mortem examination, describing any abnormal or unhealthy conditions?

Answer. The pericardium or sack surrounding the heart was filled with a serous fluid which is an abnormal condition. The heart
was abnormally large, there were fatty clots present in the
150 heart substance, dilation of the right ventricle, and the tricuspid valve showed small bands extending from the flap to the inner wall of the heart. The inner walls were pale and broke readily upon pressure.

Interrogatory 8. Describe the anatomical condition of the pancreas and its connections, pointing out any abnormal conditions?

Answer. The pancreas was enlarged at caudal extremity and was adhered to the adjacent intestines.

Interrogatory 9. Based upon this post mortem examination, to what do you attribute the immediate cause of death?

Answer. Based upon this post mortem examination, I attribute the immediate cause of death to acute dilation of the right side of the heart.

Interrogatory 10. Describe the anatomical evidences, as disclosed by the post mortem examination, from which you conclude as to the cause of death, as testified by you in your last answer?

Answer. The heart was abnormally large, the right ventricle much dilated, the wall of the ventricle very thin; the ventricle contained large amount of blood, more than would be found after death were there not dilation, and the post-mortem examination showed no other condition or evidence to which death could be ascribed.

Interrogatory 11. Doctor, assumed that the body identified as that of George W. Sanders, deceased, on which this post mortem examination was held, was a man 60 years of age, strong
151 and healthy for a man of his years, whose duties at the Vulture mine 16 miles from Wickenburg, for several years immediately preceding an accident and injury later stated, require of him, besides overseeing and directing the manual labor, the keeping of books the lifting of pans and settling basins about the cyanide plant, going about all over the mines and buildings, down in the mines through inclines to a depth of 450 feet, the climbing 200 feet and more perpendicular ladders, through tunnels and levels over ore piles, while superintending the work; takes part in timbering and all kinds of carpenter work about the mines, fires the engine, sharpens tools, shoes the horses and does other blacksmithing required about the mines; goes back and forth from Wickenburg with loaded teams and discharges the loads; carries water in five gallon pail 500 feet for domestic purposes, and windlasses ore from shafts;—a man who for many years prior to and up to the 20th March, 1902, had engaged in manual labor of various kinds and all of which labor and duties he performed without apparent fatigue, his weight about 200 lbs.

While riding upon the front lateral seat of the open part of an electric street car in Phœnix, sitting beside a man traveling with him on the same seat, on the 20th March, 1902, the car enters a curve in the track where it turns into another street while running
10 miles or more per hour, the two men are thrown into the
152 air and come to the ground in a mix-up 15 feet from the car, the deceased falling upon his back and the other man falling upon him; as soon as able to speak he complains of injury of the hip and chest; the same night he spat blood; the next day he was black and blue over the chest and hip, suffered continuous pain and expressed fear of internal injury. The next day, 22d, accompanied by the man who was thrown with him, he returned to Wickenburg, thence by team to the Vulture mine. His left arm is lame, breast over the heart is bruised and discolored which continued long after discoloration from bruises on other parts of his body had disappeared; he complains of internal pain at the waist line at the side of the navel; has heart palpitation, spat blood and vomited clots of blood; the next day, 23d March, he drives to Wickenburg in the afternoon and next morning returns to camp where he required assistance to help him from the conveyance to the house and immediately takes to his bed; is suffering from pain about his heart, at the waist line and shoulder, and from suffocation; was confined to his bed two weeks and on getting up and out it is discovered that physical exertion brings on heart palpitation, choking, suffocation and if persisted in produces vomiting.

During the month of April following the accident he went into the mine and not returning as soon as expected a man is sent who finds him leaning against the wall of an incline tunnel, ex-
153 hausted and helpless and with the assitance of another the two brought him out and to the house, after which he was not

permitted to go alone. He can no longer perform labor as before the accident because of exertion producing palpitation of the heart, choking and suffocation; the bed chamber of himself and wife is changed to down stairs because the climbing of the stairs produces palpitation; his sleep when lying down is often interrupted by choking and suffocation and is relieved only by his wife, at times others assisting her, raising him to a sitting position; the driving of a team from camp to Wickenburg, or back, so exhausts him at times that he is required to go to bed for hours and requires the administration of restoratives before he can get about again.

The patient grows worse as time passes, the character of his symptoms and suffering being the same but more aggravated and is produced with less exertion as time passes. For some time strychnine and other drugs seem to control the heart action so the patient can do things not requiring much exertion, but drugs finally fail to have the effect of quieting the palpitation; he gradually grows worse until December 1903, his limbs and feet begin to swell and continue to swell and grow worse until his death on the 6th day of February, 1904, the palpitation, suffocation, choking and vomiting coming on soon after accident and continued down to his death, becoming more violent and frequent as time passes until the end; he was 62
154 years of age when he died.

These facts assumed, Doctor, what, in your opinion, was the probable originating cause of death? And in giving your answer please disregard the anatomical conditions disclosed by the post mortem examination.

Answer. The probable originating cause of the death of Mr. Sanders was the injury received in the street railway accident, causing dilation of the heart.

Interrogatory 12. Doctor, again assuming as facts the history, and case as stated in the last interrogatory, and in addition thereto the anatomical condition of the body and organs of the deceased as disclosed to you by the post mortem examination, to what probable proximate cause would you attribute death?

Answer. To this question I make the same answer as to the last.

Cross-interrogatories Propounded to Dr. E. Payne Palmer and His Answers Thereto.

Cross-interrogatory 1. If you answer the fourth interrogatory in the affirmative, state whether or not you treated the said George W. Sanders professionally, and examined him physically, prior to performing the autopsy and post mortem examination on his body after his death.

Answer. I did not treat Mr. Sanders professionally, nor did I examine him.

155 Cross-interrogatory 2. State whether or not you know of your own knowledge, whether the said George W. Sanders suffered in his life time from irregular action of the *action*, or from dilation of the heart, or from leaky valves of the heart, or from fatty degeneration of the heart.

Answer. No.

Cross-interrogatory 3. Assuming the facts set forth in direct interrogatory No. 11, and keeping in mind the facts therein set forth relating to the deceased the day after receiving the alleged injury going to Wickenburg and then by stage to the Vulture mine (a distance of some seventy miles all told) and not consulting a physician until the fifth day after receiving the injury, does not these facts suggest a preexisting heart trouble, rather than a dilation or lesion of the heart caused by external violence.

Answer. No.

Cross-interrogatory 4. State whether or not, a dilation or lesion of the heart resulting from external injury or violence usually results quickly fatal.

Answer. No. It would depend upon the extent of the injury received, the physical condition of the patient, and the amount of resistive power displayed by him.

Cross-interrogatory 5. State whether or not, in your opinion, the fact that the deceased lived twenty three months after the injury complained of, suggests a dilation or lesion of the heart due
156 to disease, rather than to sudden external violence.

Answer. No. That depends upon the individual and his resistive and recuperative powers.

Cross-interrogatory 6. State if you know whether or not the heart is more tolerant of lesions caused by disease than those caused by external violence or injury.

Answer. That depends. The character of the external injury, the character of the disease, and the resistive powers of the individual must be taken into the account. There were present at the autopsy evidences of some violence to the heart, causing lesion. The fatty clots and condition evidently were provoked by the injury received and followed as a result of the impaired condition of the heart after the injury.

Cross-interrogatory 7. State whether or not you ever saw a case, where a person was suffering from dilation or from lesion of the heart caused by external violence, other than *perforative* wounds from bullet, knife, broken rib or broken sternum, and if you say you did, give details of such case and state whether or not such a case is detailed by any competent authority.

Answer. Yes. A man in apparently good health fell from a loaded wagon to the sidewalk. Immediately thereafter he spat blood. His lips and nails became blue, shortness of breath followed, an anxious worried expression and fear of impending death. The man was removed to the hospital, put to bed, and kept perfectly
157 quiet. I examined the case several successive days after the injury, and by physical examination as well as subjective and objective, symptoms a diagnosis of acute dilation of the right ventricle of the heart, sometimes termed lesion. The case passed from under my observation and I do not know how it finally terminated.

E. PAYNE PALMER.

Deposition taken before Thos. J. Prescott, Notary Public, in the County of Maricopa, Territory of Arizona, December 10, 1907.

Deposition of W. T. Barr.

Interrogatory 1. State your name, age, place of residence and the business in which you are engaged?

Answer. My age is forty-nine years; my residence, Phoenix, Arizona; and my occupation is that of life insurance, acting as agent.

Interrogatory 2. How long have you resided at Phoenix and in Arizona, and how long have you been engaged in your present business?

Answer. I have resided in Phoenix seventeen years, and have been engaged in my present business and occupation nearly eleven years.

Interrogatory 3. In what capacity are you engaged in your
158 present business?

Answer. I am the General Agent for the Pacific Mutual Life Insurance Company.

Interrogatory 4. State if it is a part of your education and duty in the pursuit of your business to determine the mortality of human life, and the expectation of life of persons at a given age?

Answer. It is.

Interrogatory 5. Has your experience been such that you are able to give the expectancy of the life of a person at a given age?

Answer. It has.

Interrogatory 6. What is the expectation of life of a person of the age of sixty years?

Answer. It is 14 & 10-100 years.

Interrogatory 7. What is the expectation of life of a person of the age of sixty-two years?

Answer. It is 12 & 86-100 years.

Interrogatory 8. Are you familiar with the "American experience table of mortality?"

Answer. Yes, but the proper term to be applied is "American Table of Mortality."

Interrogatory 9. What is that table? If you have it, please attach a copy of it to your answer and deposition.

Answer. It is a table of averages and arrived at by taking 100,000 children at the age of ten years, without medical examina-
159 tion, showing the number of deaths from year to year with the life expectancy of the survivors.

Interrogatory 10. What use is made of it, and to what extent is it adopted by life insurance companies in the transaction of business?

Answer. It is used by life insurance companies in fixing the premium to be paid by an applicant for insurance.

Interrogatory 11. What is the expectation of life of a man sixty years of age, as given by the American experience table of mortality?

Answer. It is 14 and 10-100 years.

Interrogatory 12. What is the expectation of life of a man sixty-two years of age, as given by the American experience table of mortality?

Answer. It is 12 and 86-100 years.

Cross-interrogatories Propounded to W. T. Barr and His Answers Thereto.

Cross-interrogatory 1. If you state the expectancy of life of a man sixty years, and of a man sixty-two years of age, in answer to direct interrogatories Nos. 6 and seven, would not such answer be different if the person upon whom you are figuring is a person afflicted with lung or heart trouble.

Answer. There is no data I know of by which I can answer this question.

160 Cross-interrogatory 2. State whether or not the expectancy of life as shown in the American Experience Table of Mortality, refers only to persons in such state of health as are able to pass a good physical examination, such as usually prescribed by insurance companies for applicants for insurance.

Answer. No. This table has not been based upon physical examinations. In my answers to direct interrogatories six and seven I have given the result of experience of community life. The probability of individual life at sixty years is thirty-five years, and at the age of sixty-two it is thirty-three years.

Cross-interrogatory 3. State, if you know, the expectancy of life of a person sixty years of age, who has for several years prior to that age been suffering from lung trouble resulting from measles or any other cause, whose physical condition is such that he suffers severly from slight exposures, and frequently disabled for months at a time from doing any work, and is subject to frequent hemorrhages, pain under shoulder blades and in chest and increasing cough.

Answer. Life insurance companies have nothing on the lives of such persons which will enable me to make answer to this question.

Cross-interrogatory 4. State, if you know, whether or not George W. Saunders of Phoenix, Arizona, now deceased, did prior to

161 March 1902, apply for life or other insurance on his person, and if so whether or not he was accepted or rejected, and the cause of such rejection, if any.

Answer. I do not know of his making application for life insurance.

W. T. BARR

Deposition taken before Thos. J. Prescott, Notary Public, in the county of Maricopa, Territory of Arizona, December 10, 1907.

(Filed in the District Court Dec. 11th, 1907.)

And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said Court in said entitled cause copies of interrogatories to be propounded to Dr. Wm. H. Ward, a witness on behalf of the plaintiff, and his answers thereto, which, reduced to questions and answers, are in words and figures following, to-wit:

162 *Deposition of Dr. Wm. H. Ward.*

Title of Court and Cause.

Interrogatory 1. State your name, residence and profession?

Answer. My name is William H. Ward; my home is in Los Angeles, California, and I am a physician and surgeon.

Interrogatory 2. If you state that you are a physician and surgeon, state when and from what medical school you graduated?

Answer. I graduated from the College of Physicians and Surgeons of Keokuk, Iowa, in 1863.

Interrogatory 3. How long have you practiced your profession?

Answer. Fifty seven years.

Interrogatory 4. If you practiced your profession at Phoenix, Arizona, state how many years?

Answer. I went to Phoenix in the year 1891 and practiced there until 1894, when I moved to Los Angeles, where I remained until 1897, at which time I returned to Phoenix, and practiced my profession actively until 1900, and from that time to a more limited extent until April, 1905.

Interrogatory 5. When did you leave Phoenix, Arizona, for your present place of residence?

Answer. The first day of April, 1905.

Interrogatory 6. Were you practicing your profession at
163 Phoenix, Arizona, in the month of April, 1902, and if so how long thereafter?

Answer. To a limited extent. In the year 1900, I was appointed superintendent of the insane asylum at Phoenix, and held such position until I left Arizona in 1905. During this period I practiced my profession among my old friends, but not generally.

Interrogatory 7. Did you know George W. Sanders, now deceased, during his lifetime, and if so state if you treated him professionally?

Answer. Yes, I knew George W. Sanders during his lifetime, and treated him professionally.

Interrogatory 8. Did you treat Mr. Sanders in about the month of April, 1902? If you state that you did, state what his ailment was at that time.

Answer. My books and records are all in Phoenix, and I do not remember dates accurately, but along about the month of April, 1902, Mr. Sanders came to my office, and said that about two weeks previously,—as I remember it—he had been thrown from the street car in Phoenix. I treated him at that time. He was suffering extreme pain in the chest and had some discolorations on his shoulder; he had difficulty in breathing, and a stiffness and soreness of the muscles. Also, his heart was enlarged or dilated.

Interrogatory 9. State how long he was under your charge at
that time, and if he subsequently called upon you pro-
164 fessionally?

Answer. I think that I saw him four or five times in the two weeks that elapsed between his first visit after the accident and

the time he was taken from Phœnix to Wickenburg. I don't remember that I ever saw him again, alive, after that.

Interrogatory 10. State what bruises and discolorations you found upon his person, if any, when he called upon you personally, in about April 1902.

Answer. I have answered this in my response to interrogatory eighth.

Interrogatory 11. State the extent of the injuries which you found at the time, and the character of his suffering?

Answer. When he came to me he was suffering from heart trouble, enlargement or dilation of the heart, and had a very frequent pulse and extreme pain in the region of the heart.

Interrogatory 12. State the location of any injuries you found upon his person?

Answer. Locally, I didn't find any injuries, except from the pain. There were no fractures of any kind. I have described the bruises and discolorations in my answer to interrogatory eighth. I gave him remedies and bandaged his chest.

Interrogatory 13. What was the condition of his heart at
165 the time he applied to you in April, 1902, for professional treatment, stating in this particular the heart action, whether regular, irregular or any other condition not normal?

Answer. The action of his heart was very irregular and very frequent.

Interrogatory 14. Did Mr. Sanders at the time he applied to you professionally, in April, 1902, state to you the cause for the condition which you found upon examination of him?

Answer. Yes, he did.

Interrogatory 15. State what he said the cause was?

Answer. He said he was thrown off the car at a curve in the road, that he was not looking for it, and was not prepared to help himself, and consequently was thrown off.

Interrogatory 16. State whether or not the history which he gave as to the cause would account for the condition in which you found him?

Answer. Well, perceptibly there was no other cause for it. He said that was the cause.

Interrogatory 17. State what that condition was?

Answer. I have already stated his condition to the best of my knowledge.

Cross-interrogatories to be Propounded to Dr. Wm. H. Ward and His Answers Thereto.

166 Cross-interrogatory 1. If you state in answer to direct interrogatory No. 13th, that the action of Mr. Sanders' heart was irregular, and not normal, state exactly what evidences you found indicating any irregularity in the heart action or that his heart was not in normal condition.

Answer. There could not be a regular action of the heart with such a degree of dilation or enlargement as in his case. The beating was irregular.

Cross-interrogatory 2. If you state that you found Mr. Sanders' heart not in normal condition, and the heart action irregular, state whether or not, if you know, the exact cause of such irregularity or non normal condition of his heart.

Answer. Prior to the accident I had not seen Mr. Sanders for two years, and had not noticed any irregularity in the action of his heart. The cause of the irregularity at this time was the dilation which I have previously mentioned.

Cross-interrogatory 3. State whether or not such irregularity or non normal condition of his heart, could have been caused by a fatty degeneration or lesion of the heart or any other heart trouble of long standing.

Answer. I have known such irregularity or non-normal condition of the heart to have been caused by fatty degeneration or lesion of the heart or other heart trouble of long standing.

167 Cross-interrogatory 4. State, whether or not, a person who receives such a severe injury as to result in lesion or dilation of a heart otherwise sound or theretofore healthy could live for any length of time after such an injury and whether or not such injuries are not usually quickly fatal.

Answer. It is hardly probably *w*hat a person could live for any great length of time, who receives such a severe injury as to result in lesion or dilation of a heart otherwise sound or theretofore healthy.

Cross-interrogatory 5. State whether or not in your opinion, the fact that injured person walked a block, and rode 1½ miles immediately after the accident, was able to be about the next day and the succeeding day rode over seventy miles to a mine, and did not consult a physician for five days after the injury, suggest that the heart trouble from which the person suffered was due to disease, rather — from external injury or violence.

Answer. Yes, so far as outward symptoms would show.

WILLIAM H. WARD, M. D.

Deposition taken before Eliza P. Houghton, Notary Public, in the County of Los Angeles, State of California, December 12, 1907. (Filed in District Court Dec. 18, 1907.)

168 And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said Court in said entitled cause Defendant's Objections to Depositions, in words and figures following, to-wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

No. 4610.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Plaintiff,
vs.
THE PHOENIX RAILWAY COMPANY, a Corporation, Defendant.

Objections to the Use of Depositions.

Comes now the defendant and by its attorneys files the objections to the use in the trial of this cause of the depositions on file herein, as follows:

(1) Objects to the use of either or any of the depositions of either or any of the witnesses: Frank De Massey, filed August 8, 1904; E. S. Turner, filed October 3, 1904; J. C. McKee, filed October 18, 1904; C. L. Kinsley; E. L. Gibson, Dan McNeil, George E. Sanders, filed September 23, 1904; Dr. R. S. Slusher, filed October 19, 1904;
for the reason and upon the ground that said depositions have
169 not, nor has any of them, been taken or certified or returned to Court as required by law.

(2) Objects to the use of the deposition of Clara S. Sanders filed herein November 14, 1905, for the reason and upon the ground that no notice of the time and place of taking said deposition or of the interrogatories to be propounded to said witness was served upon any Officers of defendant corporation, or upon attorney for said defendant as required by law and for further reason that said deposition was not taken, certified or returned as required by law.

(3) Objects to the use of either or any of the depositions of either or any of the witnesses: Dr. W. H. Ward, filed herein December 18, 1907; Dr. J. W. Foss; Dr. O. E. Plath; Dr. E. P. Palmer, filed herein December 11, 1907; upon the ground that neither of said depositions has been taken or certified or returned into Court as required by law and upon further ground that all of the "Expert Testimony" sought to be introduced by means of said and each of said depositions is, not only because of the form and substance of the interrogatories, but also because of the nature and substance of the answers thereto, incompetent and irrelevant and not applicable to
and does not tend to prove any of the issues in this case, for
170 the reason that both the interrogatories propounded to said witnesses and answers thereto are based upon wrongful conclusions and hypotheses which are not applicable to and have no bearing upon the issues involved in this case.

(4) Objects to the use of the deposition of witness W. T. Barr, filed herein December 11, 1907, upon the ground that said deposition has not been taken or certified or returned as required by law and upon further ground that a copy of the "American Table of Mortality" which is the exhibit referred to in said deposition, as forming

a basis of the testimony therein contained, and which said witness was requested to attach thereto, is not attached to or made a part of said deposition.

Wherefore, defendant, pursuant to the requirements of the Statutes filed the foregoing objections in writing, both to the form of said depositions and to the manner of taking, returning and certifying the same and asks that they be stricken from the files herein and that they be not used upon the trial of this cause.

Dated at Prescott, Ariz., this 20 day of May, 1908.

C. F. AINSWORTH,
PAUL BURKS,
Attorneys for Defendant.

(Filed in District Court May 21, 1908.)

171 And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said Court in said entitled cause Plaintiff's Exhibits "A" and "B" in words and figures following, to-wit:

In the Probate Court of the County of Maricopa, Territory of Arizona.

In the Matter of the Estate of GEORGE W. SANDERS, Deceased.

Letters of Administration.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

In accordance with an order made by the Probate Court on the 7th day of March, A. D. 1904, Clara S. Sanders is hereby appointed administratrix of the Estate of George W. Sanders, deceased.

Witness, George Kirkland, Clerk of the Probate Court of the County of Maricopa, Territory of Arizona, with the Seal of said Court affixed, this 7th day of March, A. D., 1904.

By an order of the Court.

[SEAL.] GEORGE KIRKLAND, *Clerk.*

172 TERRITORY OF ARIZONA,
County of Maricopa, ss:

I do solemnly swear that I will support the Constitution of the United States, and the Laws of the Territory of Arizona, and that I will faithfully perform, according to law, the duties of Administratrix of the Estate of George W. Sanders, deceased.

CLARA S. SANDERS.

Subscribed and sworn to before me this 7th day of March, —. D. 1904.

[SEAL.] GEORGE KIRKLAND, *Clerk.*

(Endorsed:) Copy. No. 906. Recorded Book 2, Page 558. Probate Court, County of Maricopa, Territory of Arizona. In the Matter of the Estate of George W. Sanders, Deceased. Letters of Administration Issued to Clara S. Sanders on the 7th day of March, 1904. Filed March 7th, 1904. George Kirkland, Clerk.

In the Probate Court of the County of Maricopa, Territory of Arizona.

In the Matter of the Estate of GEORGE W. SANDERS, Deceased.

Letters of Administration.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

In accordance with an order made by the Probate Court on the 7th day of December, A. D. 1905, L. H. Landis is hereby
173 appointed administrator of the Estate of George W. Sanders, deceased.

Witness, George Kirkland, Clerk of the Probate Court of the County of Maricopa, Territory of Arizona, with the Seal of said Court affixed, this 8th day of December, A. D. 1905.

By an order of the Court.

[SEAL.] GEORGE KIRKLAND, *Clerk.*

TERRITORY OF ARIZONA,
County of Maricopa, ss:

I do solemnly swear that I will support the Constitution of the United States, and the Laws of the Territory of Arizona, and that I will faithfully perform, according to law, the duties of Administrator of the Estate of George W. Sanders, deceased.

L. H. LANDIS

Subscribed and sworn to before me this 8th day of Dec. — D. 1905.

[SEAL.] GEORGE KIRKLAND, *Clerk.*

(Endorsed:) Copy. No. 906. Recorded Book 9, Page 35. Probate Court, County of Maricopa, Territory of Arizona. In the Matter of the Estate of George W. Sanders, Deceased. Letters of Administration Issued to L. H. Landis on the 8th day of December, 1905. Filed Dec. 8th, 1905. George Kirkland, Clerk.

174 TERRITORY OF ARIZONA,
County of Maricopa, ss:

I, George Kirkland, Clerk of the Probate Court in and for Maricopa County, Territory of Arizona, hereby certify that I have compared the attached copies of Letters of Administration in the Matter of the Estate of George W. Sanders, Deceased, with the originals

thereof, and I further certify said copies to be full, true and complete copies of said originals and of the whole thereof as the same remain on file and of record in my office.

Witness my hand and the Seal of said Court this 30th day of November, A. D. 1907.

[SEAL.] GEORGE KIRKLAND, *Clerk.*

(Filed in the District Court May 23, 1908.)

And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said Court in said entitled cause Defendant's Exhibits "A" and "B," in words and figures following, to-wit:

175 A. T. T.
F. E. P.

UNITED STATES OF AMERICA.
DEPARTMENT OF THE INTERIOR.
BUREAU OF PENSIONS.
WASHINGTON, D. C., *Feb'y* 6, 1905.

It is hereby certified, That the accompanying pages, numbered one to six inclusive, *is* truly copied from the originals now on file in the Bureau of Pensions.

J. L. DAVENPORT,
Acting Commissioner of Pensions.

DEPARTMENT OF THE INTERIOR.
WASHINGTON, D. C., *February* 6, 1905.

Be it remembered, that J. L. Davenport who has signed the foregoing certificate, was, at the date of signing thereof, Acting Commissioner of Pensions, and that to his attestations as such full faith and credit are and ought to be given.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, this 6th day of February, 1905.

[SEAL.] THOS. RYAN,
Acting Secretary of the Interior.
W. B. A.

176 DEF'TS' EX. "A."

(3–011.)

B. *Declaration for the Increase of an Invalid Pension.* B.

[Territory of] [STATE]* OF ARIZONA,
County of Pima, ss:

On this 7th day of June [1890]* A. D. one thousand eight hundred and [eighty]* ninety personally appeared before me, a Notary Public within and for the county and State aforesaid, George W. Sanders, aged 49 years, a resident of the City of Tucson, county of Pima, [Territory of] [State]* of Arizona, who, being duly sworn according to law, declares that he is a pensioner of the United States, enrolled at the San Francisco Pension Agency at the rate of four dollars per month, by reason of disability from disease of lungs result of
(Here name the disability for which the pension was granted.)
measles incurred in the Artil-ery service of the United States while a
(Military or Naval)
Private in Co. "C," 1 Regiment Ohio Volunteer Light Artil-ery.
(Here state rank, company, and regiment, if in the Army; vessel, if in the navy.)
That he believes himself to be entitled to an increase of pension on account of increase in the disability for which I was pensioned. My
(Here state the reasons for applying for increase. If on account of increase in
Lung trouble is more severe and are effected more severely by slight
the disability for which already pensioned, that should be described.)
causes colds or exposure which last much longer now than before.
At times when so effected I am unable to do anything for
177 months. I am now suffering nearly as much as when I was
having frequent Hemorrhage. My cough is increasing and I raise more from my lungs have more constant Pain in my chest and under shoulder blades. That he appoints [Frank A. Butts,]* of [Butts & Phillips] Washington, D. C., his true and lawful attorneys to prosecute his claim. That his post office address is Tucson, county of Pima, [Territory of] [State]* of Arizona.

Claimant's Signature, GEORGE W. SANDERS.

Attest:

THOS. D. SATTERWHITE.
ED. W. BORTON.

Butts & Phillips, solicitors of claims, Lemman Building, Washington, D. C. Received June 11, 1890.

Also personally appeared Thos. D. Satterwhite, residing at Tucson, Ariz., and E. W. Borton, residing at Tucson, Ariz., persons whom I certify to be respectable and entitled to credit, and who, being by

[* Words enclosed in brackets erased in copy.]

me duly sworn, say they were present and saw George W. Sanders, the claimant, sign his name (or make his mark) to the foregoing declaration; that they have every reason to believe, from the appearance of said claimant and their acquaintance with him, that he is the identical person he represents himself to be; and that
178 they have no interest in the prosecution of this claim.

THOS. D. SATTERWHITE.
ED. W. BORTON.
Signatures of Witnesses.

Sworn to and subscribed before me this 7th day of June, A. D. 1890, and I hereby certify that the contents of the above declaration, &c., were fully made known and explained to the applicant and witnesses before swearing, including the words — erased, and the words — added; and that I have no interest, direct or indirect, in the prosecution of this claim.

[L. S.] THOS. A. BORTON,
(Signature.)
Notary Public, Pima Co., Ariz.
(Official character.)

TERRITORY OF ARIZONA,
County of Pima, ss:

Chas. A. Shibell

I, [A. B. Sampson],* County Recorder, in and for the County of Pima, and ex officio custodian of the Official Oaths and Bonds of Notaries Public, Justices of the Peace and other officers of the said County, do hereby certify, that Thomas A. Borton before whom the Acknowledgements appended to the annexed instrument was taken was at the time thereof, a Notary Public in and for the said County of Pima, duly commissioned, sworn and qualified. I
179 do further certify that I am well acquainted with the handwriting of said Thomas A. Borton and verily believe that his signature to said Acknowledgements is genuine, his commission expires January 12, 1891.

In witness whereof, I have hereunto set my hand and affixed my official seal this 7th day of June, A. D. 1890.

[L. S.] CHAS. A. SHIBELL,
County Recorder.

E. G. H. G. P.

[* Words enclosed in brackets erased in copy.]

General Law.

DEF'TS' EX. "B."

Declaration for the Increase of an Invalid Pension.

STATE OF ARIZONA,
County of Maricopa, ss:

On this 15th day of January, A. D. one thousand nine hundred and three personally appeared before me, a Recorder Maricopa Co. within and for the county and State aforesaid, George W. Sanders, aged 62 years, a resident of Wickenburg, County of Maricopa, State of Arizona, who, being duly sworn according to law, declares that he is a pensioner of the United States, enrolled at the San Francisco, Cal., Pension Agency at the rate of 6.00 dollars per month, by reason of disability from Lung trouble, result of typhoid fever and measles, incurred in the Military service of the United States while a
180 private in Co. C, 1st O. V. L. A., Col. James Barnett. That he believes himself to be entitled to an increase of pension on account of increased disability from causes already pensioned; and a Heart trouble, resultant from causes noted above, which were contracted in the Army, and while in the line of duty.

That he was not employed in the military or naval service prior to September 9, 1862.

That he has not been employed in the military or naval service since Oct. 16, 1862.

That he hereby appoints himself his true and lawful attorney to prosecute his claim. That the number of his pension certificate is 168,033.

That his post-office address is Wickenburg, County of Maricopa, State of Arizona.

GEORGE W. SANDERS.
(Claimant's Signature.)

U. S. Pension Office, Feb. 7, 1903.

Attest. (1) A. A. PRATT.
" (2) D. J. CURRY.

Also personally appeared A. A. Pratt, residing at Wickenburg, and J. D. Curry, residing at Wickenburg, persons whom I certify to be respectable and entitled to credit, and who, being by me duly sworn, say they were present and saw George W. Sanders the claimant, sign his name (or make his mark) to the foregoing declaration; that they have every reason to believe from the appear-
181 ance of said claimant and their acquaintance with him of 20 years and 12 years, respectively, that he is the identical person he represents himself to be; and that they have no interest in the prosecution of this claim.

A. A. PRATT.
D. J. CURRY.
(Signatures of Witnesses.)

Sworn to and subscribed before me this 15" day of January, A. D. 1903, and I hereby certify that the contents of the above declaration, etc., were fully made known and explained to the applicant and witnesses before swearing, including the words — erased, and the words — added; and that I have no interest, direct or indirect, in the prosecution of this claim.

[Legal Seal County Recorder, Maricopa County.]

B. F. McFALL,
County Recorder.

Invalid Claim for Increase. General Law. Claimant, George W. Sanders, Service Co. C, 1" O. V. I. A. Inv. Ctf. 468,033 (Law Division, Feb. 10, 1903, received.) Filed by George W. Sanders, Wickenburg, Arizona.

(Filed in District Court May 23, 1908.)

182 And on the same day, to-wit: the sixteenth day of March, 1909, there was filed in the Clerk's office of said court in said entitled cause a certain Reporter's Transcript of Evidence in words and figures following, to-wit:

183 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Plaintiff,

vs.

THE PHOENIX RAILWAY COMPANY, a Corporation, Defendant.

This cause came on regularly to be heard before the Court and a Jury, on the 22nd day of May, 1908, at Prescott, Arizona, Hon. Richard E. Sloan, Judge, presiding.

Appearances:

J. M. Jamison, Esq., and Messrs. Norris & Ross, for the plaintiff.
Hon. C. F. Ainsworth and Paul Burks, Esq., for the defendant.

The preliminary legal questions having been settled, a jury was drawn, selected and sworn to try the case.

By the COURT: Most of your evidence is in the shape of depositions?

A. Yes.

Q. All of it?

A. Not all.

Q. How many witnesses will you have, Mr. Jamison, oral?

A. Two.

Q. Short or long?

A. Short.

Q. How many will you have on your side, Mr. Ainsworth?

A. Five, I think.

Q. It will take some time to get through?

A. No, I think not.

184–190 Q. If we start in at half past nine can we get through during the day?

A. We might start at nine o'clock if the Court desires.

By the COURT: We will take a recess until nine o'clock, and the jury will bear in mind not to talk about the case nor suffer any one to speak to you about the case during the recess.

* * * * * * *

191 By Mr. JAMISON: I now offer in evidence a certified copy of the inventory and appraisement of the estate of George W. Sanders, deceased, in the Probate Court of Maricopa County, filed March 21st, 1904.

By Mr. BURKS: To which the defendant objects on the ground that it is immaterial, irrelevant and incompetent, not proving or tending to prove any of the issues in this case.

By the COURT: I don't see the materiality.

By Mr. JAMISON: It is perfectly competent if your Honor please to show, where recovery is sought on behalf of an estate on account of the death of a party through the acts of another, that such person, such deceased was a person of thrift or otherwise, whether he was a person who saved as tending to show the benefit of the life of the deceased to the estate. Also it is perfectly competent in such a case to show the manner of conduct of the deceased towards his family, his liberality toward them in such a case.

192–210 By the COURT: I doubt if the inventory would show that.

By Mr. BURKS: It would only be competent in the event it went to prove something regarding his earning power, the earning power of this man. On any other theory it would be absolutely incompetent, for the reason that an insane man in the asylum might have an estate left to him of One Million Dollars and yet he would not have the ability to get out and earn a dollar.

By Mr. Ross: The defendant might prove that this estate, the property of this estate was acquired through gift.

By Mr. BURKS: That is a matter of defense.

By Mr. JAMISON: It is competent to show that the deceased, that his life was a benefit to the estate; that he was not a spend-thrift or a drunkard. It does tend to show the value of the life to the estate.

By Mr. BURKS: We object to it on the further ground that it is not the best evidence of the issues offered to be proven thereby.

* * * * * * *

211 GEORGE B. UPTON, called as a witness by the plaintiff, being by the Clerk first duly sworn, testified as follows:

Direct examination by Mr. JAMISON:

Q. Mr. Upton, where do you reside?
A. At the Oro Grande Mine, four miles from Wickenburg.
Q. What is your business?
A. Mining Manager.
Q. Did you know George W. Sanders, the deceased, during his life time?
A. Yes.
Q. When did you first become acquainted with him?
A. I believe it was in the fall of 1900.
Q. What was the occasion of your acquaintance?
A. I think I met him the first time at Wickenburg, and later went out to the mine at the Vulture.
Q. Do you know the Vulture mine, so called?
A. Yes.
Q. What was his business during the time you knew him?
A. At that time he was in charge of the property and running a cyanide plant and doing assessment work on the property.
Q. At the Vulture?
A. Yes.

212 Q. How far distant is the Vulture property where he was employed from Wickenburg?
A. I would judge fifteen or sixteen miles.
Q. Did you have occasion to visit the mines, to go through them and over them?
A. Yes, I was there at different times, on a good many occasions.
Q. Are you familiar with that property?
A. Yes, sir.
Q. How frequently did you see the deceased?
A. Well, during 1901 I spent most of my time in Wickenburg and used to see him nearly every time he came to town and on a number of occasions I was out at the mine.
Q. What labors did you see him engaged in, what duties?
A. He had charge of the work and done the general repair work around the camp and the blacksmith shop. He used to come down to Wickenburg and haul out the supplies.
Q. What about loads, what do you know about the loading?

By Mr. AINSWORTH: Loading what?
By Mr. JAMISON: Teaming.

A. I have seen him come in and load up baled hay, and I have seen him load cans of cyanide.
Q. What strength did such labor require?
A. A man had to be an able bodied man.
Q. What other duties—Do you know who had charge of the books and so on?
A. I think he had.

By Mr. BURKS: We object and move that the answer be stricken out.

By the COURT: Do you know anything about that?

213 A. Yes, I have been there and spent several days at the mine with him at different times. I know he looked after all the bookkeeping and paid all the bills and every thing of that kind.

By Mr. JAMISON:

Q. Now, I wish you would describe the Vulture mine so we—the workings there, the development, the tunnels, drifts, stopes and so forth.

By Mr. BURKS: We object to that on the ground that it is immaterial, irrelevant and incompetent and not calculated to prove, that is it does not tend to prove the issues in this case.

By the COURT: He may answer the question if he does it briefly without too much detail.

A. There are some very large stopes there and two caves, some very difficult places to get through.

By Mr. JAMISON:

Q. What do you know of his going through there, what was required of him?

A. Every time we went through the mine except twice Mr. Sanders went through with us, showing us the property, and always went ahead and had no trouble at all in going through the workings any place we could follow him.

Q. Describe what you had to climb over?

A. I remember of going from one side of a stope down to the other, the caving had closed up most of the hanging wall so

214 that we had to crawl almost thirty-five feet and I don't think it was over two feet in height in the largest place, and another place where they go up into the crosscut in the incline shaft, there is a bad cave, and a ladder leads up onto the point and goes about eighteen inches from the top, there is no place on either side to catch hold of, that is the formation, and nothing on top. It is rather a difficult place to get up.

Q. Whether or not it became necessary in his work for him to pass through these places?

By Mr. BURKS: We object to that.

By the COURT: The question is whether he did go through them.

A. Yes, he went through half a dozen different times with me.

By Mr. JAMISON:

Q. When was that, before or after the accident?

A. That was before the accident.

Q. Did you ever go through with him after the accident?

A. No, I went down there to go through with him, I have for-

gotten who went through. Yes, at the time I remember Mr. Sanders wasn't able.

By Mr. Burks: We move that that part of the answer be stricken out.

By the Court: What do you know of that subject, as to his ability?

A. About an hour before we were taken into the mine he took a bad spell and was taken into the office and laid on the bed until we left the office in the afternoon for Wickenburg.

Q. Do you know where the pump was setting in the mine?

A. Yes, sir.

Q. And whether it was difficult to get to the pump?

A. Yes, sir.

Q. At about what depth was that pump set?

A. I could not state definitely, I should judge it was probably 150 to 200 feet below the 300 level. Below the level the stoping was done.

Q. Making it 450 to 500 feet?

A. Yes, I should judge 450 feet or more.

Q. What necessity was there to operate the pump during that time?

A. For the cyanide plant. They had a large wooden tank on the surface and a steam boiler they used to keep the tank full of water.

Q. The water for operating was pumped from the bottom of the mine?

A. Yes, sir.

Q. You may state if prior to this accident you saw Mr. Sanders at other points than Wickenburg or the Vulture engaged in physical labor?

A. Not that I remember. Well, he visited the Oro Grande a number of times and has been through the workings there, but not doing any labor.

Q. What can you say as to his ability to perform labor and his power of endurance prior to the accident?

A. Why, he seemed to be a capable man, able bodied in every way.

Q. What was his age at the time of this accident?

A. I don't know definitely, I should judge somewhere about sixty years.

Q. What character of man was he as to his stature, physical makeup and weight?

A. Well he was a wiry sort of man, slender, that is he was not fleshy at all.

Q. Rather tall man?

A. Yes, I should judge he was about five feet ten inches, I could not state that positively.

Q. Were you familiar in their home where he and his wife lived out there, the home of himself and wife?

A. Yes, I spent a number of nights there. I would go out one day and back the next.

Q. Where was their bed room prior to this accident?
A. Prior to the accident it was a large room over the office.
Q. That was a two-story building?
A. Yes, sir.
Q. How was that fitted up?
A. Well——

By Mr. AINSWORTH: That is objected to as being immaterial and irrelevant.

By the COURT: How can this be material?

By Mr. JAMISON: I propose to show by this witness that this was fitted up with a bath room, with every convenience, and that after the accident Mr. Sanders was unable to go up stairs and that they were obliged to take a small room built without any closets.

By Mr. BURKS: What has that to do with the case. The convenience of a bath is not an element to be considered

217 By the COURT: Not unless it bears on the effects of the accident.

By Mr. BURKS: There is nothing in the fitting of the bedroom of the deceased——

By the COURT: No, it is a question of the elevation of the bedroom above the store.

By Mr. JAMISON: We propose to show in this case that they were obliged to abandon that——

By Mr. BURKS: He asked the witness whether or not he knew where they slept.

By the COURT: Proceed.

A. Prior to the accident they had a large room over the office afterwards they had a small room right out from the office.

By Mr. JAMISON:

Q. Do you know why?

By Mr. BURKS: We object to that as calling for a conclusion of the witness.

By Mr. JAMISON: He can answer yes or no.

By the COURT: Yes, do you know?
A. Why, what they told me.

By Mr. BURKS: We object to that as hearsay.

By Mr. ROSS: The witness has shown a knowledge of what Mr. Sanders could do after the accident.

By the COURT: Do you think what they told him is competent?

By Mr. ROSS: As to the reason Sanders gave for the
218 change would be competent.

By the COURT: The objection is sustained.

By Mr. JAMISON:

Q. You may state what effect, if you know, climbing stairs or a ladder or making an elevation had upon Mr. Sanders after the accident?

By Mr. BURKS: We object.

By the COURT: If that calls for his observation he may testify to it. Did you have any observation?

A. No, I could not state definitely.

By Mr. JAMISON:

Q. Did you, after the accident, notice any difference in Mr. Sanders respecting the effect upon him of exertion than previous to the accident?

A. Yes, sir.

Q. What was that?

A. Well, he seemed to have difficulty in getting around, he didn't undertake to do any heavy work, that is at any time I was out there.

Q. How about when he would come to Wickenburg?

A. Well, he seemed altogether different from what he had before.

Q. What position would he take, if you observed, after the accident when walking?

A. Well, he walked rather stiffly, I think he had the habit of doing this, sort of resting.

Q. Holding onto his breast?

A. Yes, sir.

Q. Which side?

A. Left side.

Q. You knew Mrs. Sanders, did you?

A. Yes, sir.

Q. What was her physical condition?

219 By Mr. BURKS: We object to that on the ground that there is no occasion of bring in the condition of Clara Sanders prior to this accident.

By the COURT: The objection is sustained.

By Mr. JAMISON: The purpose is to show that prior to this accident Mrs. Sanders was a strong, healthy, robust, hearty woman.

By the COURT: You are trying to show the effect of the accident on her? The objection is sustained. That is incompetent. That would be hearsay to introduce it. It is too remote.

By Mr. JAMISON: I think, as suggested by my associate, I did not get the question all in.

By the COURT: Sufficient to indicate it. You said the effect of this accident.

By Mr. JAMISON: I purpose to show the effect of taking care of the deceased upon her physical condition.

By the COURT: Yes, I see the point. The objection is sustained.

By Mr. JAMISON:

Q. What was the age of Mrs. Sanders?

By Mr. BURKS: We object to that on the same ground.

By the COURT: The objection is sustained.

By Mr. JAMISON: Mrs. Sanders is the beneficiary.

By the COURT: Under the statute it is for the benefit of the estate

not the particular beneficiary. It is what the life of the
220–222 deceased is worth to the estate, not to the beneficiary. The objection is sustained.

Cross-examination: None.

* * * * * * *

By Mr. JAMISON: I now offer in evidence the deposition
223 of FRANK DE MASSY, a witness on behalf of the plaintiff.

Interrogatories read by Mr. Jamison. Answers read by Mr. Ross.

Interrogatory VI.

By Mr. BURKS: We object to that on the ground that it does not tend to prove any issue in the case.

By the COURT: I think that is admissible.

Interrogatory VII.

By Mr. BURKS: We object to the latter part of the question. We think it is objectionable.

By the COURT: "Without apparent fatigue?"

By Mr. BURKS: Yes.

By the COURT: Answer the question.

By Mr. BURKS: We object to that part of the answer: "They informed me that — had been in a street car accident," and move that that be stricken out.

By the COURT: That may be stricken out.

Interrogatory VIII.

By Mr. BURKS: We object to that as calling for a conclusion of the witness whether or not the deceased was able to perform more than others.

By the COURT. The answer is hardly competent. The objection is sustained to that.

Interrogatory IX.

By Mr. AINSWORTH. We object to that. He has already stated that he said he went in in March 1902.

224 By the COURT: He may answer the question.

Interrogatory X.

By Mr. BURKS: We object to that on the ground that several questions are included in one. The witness is asked to state not only the facts but his movements, which he could not do unless he accompanied the deceased.

By the COURT. Part of it is admissible. Yes, I think much of it is inadmissible. Perhaps the latter part of it. I think the first sentence and perhaps the last are admissible, that is all.

By Mr. BURKS: As to his condition when he returned?

By the COURT: Yes.

By Mr. BURKS: The condition when he returned would be a response to this question?

By the COURT: It raises several questions. Some of these are admissible. What part do you object to?

By Mr. BURKS: I think perhaps there would be very little admissible until he shows his means of knowledge.

By the COURT: He testified he was there.

By Mr. BURKS: Yes, but he could not tell where the man went.

By the COURT: No, that is not asked. I will sustain the objection to interrogatory X.

Interrogatory XI.

By Mr. BURKS: The objection to that question is that it embraces the whole scope in an attempt to bring out information on several distinct questions, and that it does not confine the witness to
225 answer as to matters purely within his observation.

By the COURT: The objection is overruled. I think the answer is admissible.

By Mr. BURKS: May we not have stricken from the answer the word "palpitation."

By the COURT: He states that he was with him.

Interrogatory XII.

By Mr. BURKS: We object to that as calling for a conclusion except as to the incidents observed.

By the COURT: Yes, I think so. He may testify to the incidents.

By Mr. JAMISON: It would go to the failure of the question ——

By the COURT: No, it goes to the competency of the witness to testify to it. The first sentence may be omitted, the rest may be read.

Interrogatory XIII.

By Mr. BURKS: We object to that on the ground that the question is evidently improper and that it does not call for competent testimony.

By the COURT: I think the answer is objectionable. I sustain the objection.

Interrogatory XV.

By Mr. BURKS: We object. The answer is not responsive.
226 By Mr. ROSS: The fact that the answer is not responsive is not material.

By the COURT: That he did the work before that and somebody else did the work after that. It would throw light on his ability, as indicating whether he had the physical ability to do it. If a man is active and has been accustomed to doing a certain amount of physical work, if that work is in the line of his employment, and he ceased to do it and some body else did it, it would go to the physical disability of the man somewhat.

Interrogatory XVII.

By Mr. BURKS: We object to that on the ground that it is incompetent and calls for a conclusion of the witness, and no proper foundation has been laid.

By the COURT: The answer may be read.

By Mr. BURKS: We move that that part about "envy" be stricken out.

By the COURT: That is not objectionable. You must take into consideration the limitations of language and the power of a man to express himself. We know when one says he envys another man, his strength, that is negative, that he thinks the other man has great strength.

GEORGE B. UPTON, is recalled by plaintiff, having been heretofore duly sworn, testified as follows:

Examined by Mr. JAMISON:

227–230 Q. Mr. Upton, did you know the habits of the deceased as to sobriety, and generally his habits? A. I never saw him take a drink.

By Mr. BURKS: We object to that.

By the COURT: I think that is admissible. Perhaps all these things are necessary and important to lay the foundation for a hypothetical question. A drinking man might have palpitation of the heart and all sorts of things whereas a non-drinking man might not have such troubles.

By the WITNESS: I never saw him take a drink and I don't know that he ever did.

By Mr. BURKS: We move to strike out the answer.

By the COURT: That tends to establish the habits, if he knows the man well and never knew him to take a drink.

By Mr. JAMISON:

Q. Do you know whether he used tobacco?

A. I can't recollect that I ever saw him use any. I don't remember seeing him smoke. He might have chewed. I am not certain as to that.

Q. Do you know of his holding a position in the Grand Army of the Republic?

By Mr. BURKS: Now we object to that.

By the COURT: The objection is sustained to that.

* * * * * * *

231 J. M. JAMISON, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Examination by Mr. Ross:

Q. You are a resident of Phoenix, Mr. Jamison?

A. Yes, sir.

Q. And a practicing attorney?

A. I am.

Q. How long have you been a resident of Phoenix?

A. I am in my ninth year now.

Q. Were you acquainted with George W. Sanders in his lifetime?

A. I was.

Q. How long had you known him?

A. I became acquainted with the man first in the year 1900, in the fall of 1900, and I knew him continuously up to the time of his decease.

232 Q. State the nature of your relations with him and his family, whether they were intimate or otherwise?

A. The relations between him and me were very intimate both as friends and professionally, also the family, my wife and Mrs.

Sanders, my wife spent considerable time at different times at the Vulture mine and I also repeatedly visited there. When they would be in Phœnix they would be with us quite a good deal.

Q. Are you able to state the age of the deceased when he died?

By Mr. BURKS: We object to that as not the best evidence and hearsay.

By the COURT: I think that is admissible.

A. I am.

By Mr. Ross:

Q. Please state it?

A. He was in his sixty-second year at the time of his decease, either sixty or sixty-two.

Q. Are you able to state the earnings of Mr. Sanders while he was in his position at the Vulture mine?

A. I am.

By Mr. BURKS: That cannot bind us and is objectionable.

By the COURT: Did you know what amount of salary he got?

A. Yes, sir.

By the COURT: He may state what he does know about that.

By the WITNESS: I do know.

By Mr. BURKS: We object to it on the ground that this witness testified that his acquaintanceship began after the acci-
233 dent.

By the WITNESS: O, no.

By Mr. BURKS: Any way he does not state the means he had for knowledge on that point. I think the foundation should be laid first.

By the COURT: Do you wish to examine him on his voir dire?

By Mr. BURKS: Yes, sir.

By the COURT: Very well.

By Mr. BURKS:

Q. Mr. Jamison, were you ever an officer in any way of the Vulture Mining Company?

A. I was not.

Q. Did you have anything to do with the financial affairs of that company?

A. I was the attorney for the company.

Q. And as such attorney was it your duty to disburse the funds of the company?

A. I was also the attorney for the estate of George W. Sanders, deceased, and at the time of his decease the books came into the hands of Mrs. Sanders who was the administratrix, and to my hands. And at that time there was nearly one thousand dollars his due.

By Mr. BURKS: We object. The books are the best evidence of that and we move that part of the answer be stricken out.

By Mr. Ross: That is not the only way you can prove what a man has got.

By the WITNESS: I settled it for the estate with the com-
234 pany, the balance due, with the President, Henry M. Love of Chicago, the President of the company who came out after Mr. Sanders died and that was adjusted.

By Mr. BURKS: It is that method of putting in evidence on that subject, by a statement of Mr. Sanders and which came to him after the decease.

By the COURT: Why doesn't that tend to show the wages he got.

By Mr. BURKS: The books themselves which came into this man's hands are the best evidence.

By the COURT: Why better evidence than the admissions of the company, the President of the company.

By Mr. BURKS: That is a transaction of the balance due.

By Mr. AINSWORTH: That could be true, but how can this company make testimony against us. Suppose the company told him he got Five Thousand Dollars a year, we have nothing to contradict that.

By the COURT: If the statement were made against the interest of the company it would bind them. If Mr. Jamison arranged a settlement for the amount coming to the estate in behalf of salary or wages and the company settled upon a certain basis it does seem to me this testimony would tend to show the wages he was getting, because it was against interest.

By Mr. BURKS: It is a confidential communication, the
235 witness has already testified that it came to him in his capacity as attorney and consequently in that capacity it is confidential.

By the COURT: What is before the Court now?

By Mr. Ross: We are endeavoring to reach the point whether Mr. Jamison is competent to testify in answer to the question we have put to him.

By the COURT: I understand the objection is now made to the original question?

By Mr. Ross:

Q. At that time did you ascertain the amount paid Mr. Sanders per month?

A. I did.

By Mr. AINSWORTH: We object to the form of the question. Let him state what was said and done.

Q. How did you ascertain it?

A. At the time, through Mr. Love and in the settlement and the adjustment of the question, and besides I knew all the time what he was getting.

By Mr. BURKS: We object on the ground that no foundation has been laid, it is laid by reason of a communication to this witness in his capacity as attorney.

By the COURT: Do you think that is a confidential communication?

By Mr. BURKS: I do, if he obtained this information in that manner.

By the COURT: He did not obtain this from the deceased
236 but from the company. It is not a violation of confidence for this attorney to testify to what he may have learned, as attorney for the administratrix, I don't see how that can be a violation of any confidence.

By Mr. AINSWORTH: I think it is hearsay. Somebody told him.

By the COURT: I think not. It depends on how that information was obtained. If it was a settlement, that is evidence tending to show and establish what wages he was getting. A check or anything of that sort. If this witness seen a Hundred Dollars paid at a certain time by the company and at another time by the company all that would tend to establish the wages although it might not conclusively show it. When there is a settlement of the accounts based upon services rendered by the deceased, a certain amount is allowed by the party upon whom the claim is made, I cannot see why it is not evidence tending to establish the wages he was getting. Answer the question.

A. He was receiving One Hundred Dollars per month and keep of himself and wife.

By Mr. Ross:

Q. What heirs, if any, did the deceased leave, if you know?

A. He left a widow, Clara S. Sanders, his son, George E. Sanders, and his daughter, Ida S. Osgood.

Q. You stated a moment ago that you had frequently visited George W. Sanders at the Vulture mine. Was that before or after the accident?

A. Both before and after.

237 Q. When you were there before the accident, state whether or not you ever went through the mines there with George W. Sanders?

A. I have gone through them.

Q. Describe the character of climbing necessary in getting through the mine and which was actually performed by the deceased under your observation?

A. The mine had levels, drifts, cross-cuts, tunnels at different levels. In many places in going through you had to climb over large piles of ore knocked down and lying there, and ladders difficult to climb, inclines at various depths extending down. The lowest level was either 450 or 500 feet, I can't say which. I have been through that mine with Mr. Sanders, also on one occasion with other parties, prospective buyers.

Q. Describe these ladders you have mentioned, their height and general position?

A. There is one ladder that is upright. It is an upright shaft 212 feet deep. I went down that with Mr. Sanders. I went down there prior to the accident. He went ahead of me in going down and behind me coming up. We went down and through the drift

after reaching the bottom of the shaft, through to the ore bodies, I think it was about 360 to 400 feet to where the ore body was.

Q. Describe in detail the character of physical work which you have seen Mr. Sanders perform there prior to the accident?

A. Well, of course, prior to the accident in going through those workings of course I could not keep up with him. He always
238 went ahead of course. He was always out first or waiting for me. He could beat me at it although I am very rugged. I went down with him once when he was adjusting a pump, I think this was down on the 450 foot level where the water was. That is the only time I went to that depth. I refused to go later, it was too hard work. When parties went through to look at that he took them.

Q. State what you observed of Mr. Sanders handling heavy articles in loading wagons before the accident?

A. I have ridden with Mr. Sanders on the freight wagon from Wickenburg to the mine and from the mine to Wickenburg on different occasions. He would load the wagon. I remember that he wrote to me to come up and that he would be in town to go out. He loaded cyanide from heavy cars, and hay, and there at Wickenburg he unloaded his load, and he has carried his loads back and discharged them.

Q. What manual work did he do about the mine prior to the accident, running machinery, or doing any other work a laboring man might do?

A. He was there and did work considerable. There was mining going on. I was there at that time two or three days, I think Mrs. Jamison was with me at that time. The mining was going on besides the cyanide plant was being operated and he was in charge. That was the first time I ever went down in the mines. He was in charge then and taking hold as the other men, not constantly
239 for of course we were there, but he was doing all kinds of work about there, black-smithing, horse-shoeing, lifting the cyanide pans, all kinds of work, having general charge.

Q. Did he do such work as handling a windlass?

By Mr. Burks: We object. Mr. Ross knows better than to put such leading questions.

By the Court: The objection is sustained.

By Mr. Ross:

Q. Have you any other matters you seen him do there in the way of work that you have not mentioned?

A. Yes, there was work going on on some shafts at one time there sometime in December and he was there windlassing. That was assessment work on outside claims, he was there windlassing.

Q. How soon after the accident did you see the deceased?

A. At that time we lived at the Adams Hotel.

By Mr. Burks: We object to that as immaterial, irrelevant and incompetent.

By the Court: O, well, yes.

By Mr. Ross:

Q. Did you ever see the deceased after the accident?

A. I saw him and the whole party, he and his son and Mr. McKee of Grand Rapids, Michigan, whom I knew in Michigan very well, in fact we were friends in Grand Rapids, Michigan. McKee came into the hotel with them that very evening of the 20th of March. I was in the office at the time they came in, both myself and
240 my wife. Of course their condition attracted us at once and we went up to them.

Q. State what observation you made of Mr. Sanders' condition. What injuries if any he had apparently suffered?

A. Mr. Sanders was all dust and dirt, sort of begrimed, and his face covered with a sort of soot or dust from cinders, and he presented a condition that was anything but presentable and so did Mr. McKee, but not so much so as Mr. Sanders. The first thing I noticed he was holding his hand up this way (indicating on breast). He was standing there while somebody was registering. That is the situation I saw him in first. At the first sight.

Q. Describe what symptoms of injury you saw at that time, or while in Phoenix?

By Mr. Burks: No, that is not the way he should put that. He cannot describe the symptoms. He can describe the evidences of symptoms.

By the Court: He can testify to what he heard and saw. Mr. Jamison is a lawyer. I don't know that he is a skilled physician.

By Mr. Ross: We will prove that he is a physician if necessary.

A. Mr. Sanders approached Mrs. Jamison while I approached Mr. McKee whom I had not seen for some time. As he started I saw he was lame, that was the first I noticed of the evidence of injury, or that might have been outside of his appearance which showed that he had been in some kind of a mix up. I, of
241 course, was at his room later that night and the next day and saw him and also what his appearance was. In some instances——

Q. Describe the incidents which you observed that night and the next day?

A. Later in the evening I went up to his room as I did also to Mr. McKee's, and he made complaint. He then described fully what had happened, not so much had been said prior to that time. He made complaint of his left chest, soreness, his left arm was sore, and it was with difficulty that he moved it. He complained generally of being sore and knocked out. The next day I was at his room. He remained in all the next day. I was in his room during the day. I was in his room that night. That night he vomited some, and he spat some blood and vomited up some clots of blood that night. That was the 21st, I think. I think they left for Wickenburg on the next morning train.

Q. Now did you ever visit the Sanders family at the Vulture mine after that?

A. Yes, I did the following June after this accident. I went up

there on some business and Mrs. Jamison went with me. She was there about a month. Mrs. Sanders had been a dress-maker prior to her marriage. She did Mrs. Jamison's dress-making and had since 1901. She would come down to Phoenix or Mrs. Jamison would go up there. I went up and brought her down in about a month, that was June following the accident. I was there again in the following November, I think it was, or in December.

242 Q. There was mention made this morning, in the testimony of Mr. Upton, about the change in the sleeping quarters. State what you know about that?

By Mr. Burks: We object to that as being immaterial, irrelevant and incompetent, and not tending to prove any of the issues in this case.

By the Court: Yes, state what you know of your own knowledge.

A. Prior to this accident their room and sleeping quarters were up stairs where there were conveniences, a very large room and a bath and all that, besides a large closet.

By Mr. Burks: The witness knows that that identical testimony was stricken out this morning. I object to it and move that it be stricken from the record.

By Mr. Ross: I think that testimony is material.

By the Court: I don't know that it is so material.

By Mr. Burks: What is the use of such testimony, what is the materiality of that?

By the Witness: They occupied that room prior to the accident. When I went back there after this accident, we went up stairs. Mr. Sanders could not climb those stairs when I was there in June.

By Mr. Burks: That we object to.

By the Witness: I seen him one day, he got part way up and had to stop.

By the Court: Remember you are a witness now and not the attorney.

243 By Mr. Burks: Go ahead. Let him tell everything you know about it, tell the whole story, don't pay any attention at all——

By Mr. Ross: We object to this sort of talk. This is a dignified proceeding. It is not a comic opera. Counsel is trying to play——

By the Court: Yes.

By Mr. Ross:

Q. Go ahead, Mr. Jamison.

A. During the time when I was there in June Mr. Sanders started up the stairs, it is rather a steep stairs, he called me to come down and I met him on the stairway, he was panting and his heart was fluttering, and he said he could go no further. I assisted him down those stairs and it was then that he told me why they moved down those stairs.

Q. What knowledge have you of Mr. Sanders' habits as to the use of intoxicants or narcotics, tobacco or otherwise?

A. He did not use liquors at all. As to tobacco, I don't recall ever seeing him use it.

Q. Was Mr. Sanders in Phoenix at your office subsequent to the accident?

A. O, yes, repeatedly.

Q. What, if anything did he do, if you know, to alleviate the palpitation of his heart and his general symptoms?

A. He used strychnine for a time.

Q. State what you know of his use of strychnine and the results of it?

A. He used it for some considerable time, carried it with
211 him and used it. I knew what it was because my wife uses it and has to use it all the time. After a time that failed to have any effect on him.

Q. Did you notice what effect, if any, was produced on Mr. Sanders by physical exercise after the accident?

A. After the accident the man was unable to engage in any physical exertion. He had to walk very slowly, and sometimes if he attempted to walk faster he always paid the penalty with suffocation, palpitation and pain.

Q. What was the result of exercise when he persisted in it?

A. If he persisted too long it would result in choking and vomiting, if he persisted. I have seen him vomit repeatedly. I have seen it both in Phoenix and at the mine. It has occurred in my office, his coming there.

By Mr. Ross: Is it admitted that the Phoenix Railway Company was operating, or through its agent was operating, the car in question at the time of the accident?

By Mr. Ainsworth: There is no question about that.

By Mr. Ross:

Q. I will ask you, Mr. Jamison, to describe to the jury from your knowledge the junction of these streets at which the accident took place, just the geography so the jury may appreciate it.

A. The junction at which this accident occurred was West Adams Street and Sherman Avenue. Sherman Avenue is the first street east of the Capitol. West Adams Street runs east and we
215 passing on the north side of the Capitol. The turn was at The northeast corner of the Capitol grounds, rounding that curve while running east, turning directly south in Sherman Avenue.

Q. Sherman Avenue is the street right in front of the Capitol?

A. Yes, I think sometimes called 17th Avenue there, I think that is it.

Q. I will ask you to state, Mr. Jamison, whether or not a suit was filed by you in behalf of George W. Sanders against the Phoenix Railway Company on account of this injury prior to the death of Mr. Sanders?

A. It was

By Mr. AINSWORTH: We object to that as immaterial and irrelevant.

By the COURT: Well, the evidence is in, let it stand.

By Mr. ROSS: What became of that suit?

By Mr. AINSWORTH: We object to that as immaterial.

By the COURT: The objection is sustained to that.

By Mr. ROSS: Our theory is to show that this matter has been prosecuted with diligence.

By the COURT: Do you think that is a matter for the jury?

By Mr. ROSS: It is a matter that is frequently brought to the attention of the jury.

By the COURT: The history of the case is here.

By Mr. ROSS: I don't believe the history of the case brought by George W. Sanders is in the record. It would appear to me
246 to show the natural result of that case when he died.

By the COURT: He may state when the case was filed.

By Mr. BURKS: We object to any testimony relating to any other case than the one here pending.

By the COURT: Answer the question.

By Mr. BURKS: Exception.

A. My best recollection is that I filed that suit late in the fall of 1902 or very nearly in 1903.

By Mr. AINSWORTH: Here is the original summons.

By Mr. JAMISON: What is the date of that.

By Mr. AINSWORTH: The 16th day of January, 1903.

By Mr. JAMISON: That is correct then. That is about my recollection the last of 1902 or the first of 1903.

By Mr. ROSS:

Q. What became of that suit?

A. Under the law it abated on the decease of Mr. Sanders. Could not be prosecuted.

Cross-examination by Mr. BURKS:

Q. Mr. Jamison, you were acquainted with the wife of George W. Sanders?

A. Very well.

Q. How long have you known her?

A. The first acquaintance began in 1900.

Q. Did you know her age?

A. Yes, sir.

Q. How old was she in 1900?

A. Well, let's see, I should say thirty-six in 1900.

Q. Did you know the family of the deceased, George W. Sanders?

A. The children?

247 Q. Yes.

A. Both of them.

Q. How old are those children you refer to?

By Mr. ROSS: We object to that as immaterial.

By the COURT: The objection is overruled.

A. George E., whose deposition was read here, is, I should say about——

By the COURT: He stated his age as twenty-eight.

By Mr. BURKS:

Q. Do you know the age of Sanders' daughter?
A. She was younger.
Q. How much younger?
A. I should say five years younger.
Q. Married or single?
A. Married.
Q. Do you know whether she is still married, so far as you know yourself? Was she married when you knew her first?
A. Yes, she was at that time.
Q. How long had she been married at that time?

By Mr. ROSS: I don't believe she is in the least material.

By the COURT: What is the use of putting it in here? The effect on the jury might be considerable if they were children. As you put it in you ought not complain.

By Mr. ROSS: I don't complain except as to whether they were married, minors, or divorced or not.

By Mr. BURKS:

Q. Do you know whether or not the Mrs. Sanders who was the wife of George W. Sanders at the time you visited the Vulture mine was the first or the second wife?

By Mr. ROSS: That is objected to as being immaterial. How does that become material?

By the COURT: I presume the second wife had as many claims as the first.

By Mr. BURKS: I want to ascertain whether she was the mother of these little children.

By the COURT: I think the jury might take that for granted that a mother of thirty-six would hardly be the mother of a boy of twenty-eight.

By Mr. BURKS:

Q. When was the first time you visited Mr. Sanders at the Vulture mine prior to the street car accident complained of?
A. I think that was early in 1901.
Q. Are you a practicing physician? Have you ever taken a medical course?
A. I have.
Q. Have you ever——

By Mr. ROSS: We object, that is improper cross examination.

By the COURT: The objection is overruled. Go ahead. He has testified as to this man's diseased condition.

By Mr. BURKS:

Q. Have you ever been admitted to practice medicine in the Territory of Arizona?

A. I never graduated in medicine. I quit before I completed the course and turned my attention to the law.

249 Q. You don't claim to be a physician?

A. Not at all. I lacked a full year of taking the diploma.

Q. With your medical knowledge which you say you had, do you think you are capable of prescribing for those who have suffered an injury?

By Mr. Ross: We object to that. That is immaterial.

By Mr. Burks: This is cross examination on the statement of what took place in the room that night.

By Mr. Ross: I challenge counsel to point out a single thing in the direct examination by the witness as to his ability to administer medicine.

By the Court: Except the use of strychnine.

By Mr. Burks:

Q. Has your study of medicine been such as to qualify you to prescribe for one who has suffered an injury?

A. I would not want to attempt it unless in a case of emergency.

Q. Would you attempt on the basis of your knowledge of medicine to prescribe if a physician were available?

A. No, sir.

Q. You lived in the Adams Hotel at the time of this injury?

A. Yes, sir.

By Mr. Ross: We object to that.

By Mr. Burks: This evidence is material, this is the only witness who will be able to testify to the facts we desire to bring out.

By the Court: Yes, these are questions leading up to a
250 hypothetical question.

By Mr. Burks: My idea is that this man Sanders first consulted the lawyer and then the doctor.

By the Court: Your questions are direct to the knowledge of Mr. Jamison as to medicine and as to his ability to prescribe, that does not appear ——

By Mr. Burks: I will leave that point.

By the Court: What is the question now?

By Mr. Burks: As to whether Dr. Craig was the house physician at the hotel in which Mr. Jamison was living?

By the Court: He may answer that question.

By Mr. Ross: The objection is that it is going into a matter not gone into on the direct examination.

A. He lived in the house.

By Mr. Burks:

Q. In the hotel to which these people came?

A. Yes. I did not go to his room in any other capacity than as a friend of him and his family.

Q. Mr. Jamison, do you know whether or not a physician was called to see Mr. Sanders at the Adams Hotel on the night of the 20th or at any time during the day of the 21st or the night of the 21st?

By Mr. Ross: We object to that as immaterial and irrelevant, and on the further ground that it is not proper cross examination.
By the Court: Answer the question.

A. I don't know of a physician being called on the night
251 of the 29th. Whether there was one called the next day or not I can not say.

By Mr. Burks:

Q. Did you know when Mr. Sanders and wife were married?

By Mr. Ross: We object to that as immaterial and irrelevant.
By the Court: What is the purpose of that?
By Mr. Burks: I withdraw the question.

Q. Do you know who directed Mr. Sanders to cease occupying the big room up stairs and move to the little room down stairs?
A. No, sir.

By Mr. Ross: We object to that language. It is assuming something that is not in the record.
By the Court: Yes, there is an assumption in the question perhaps not justified that he has an unseen hand.
By Mr. Ross: We now offer in evidence the testimony of Dr. R. S. Slusher.
The interrogatories and answers were all read except those that were objected to and as to those the reading depends on the ruling of the Court, if permitted they were read.
Mr. Jamison reading the interrogatories and Mr. Ross reading the answers.
Answer to Interrogatory X.
By Mr. Burks: To that we object to anything said.
By the Court: Yes.
252 By Mr. Jamison: Wait a moment. If your Honor please, the physician has a right to the history of the case.
By Mr. Aylsworth: That is a statement about a past transaction, he cannot give that.
By Mr. Burks: It further appears that any statement made was after the injury. Any such statement would be self serving.
By the Court: I don't believe you can ever admit statements made to a physician as substantive testimony, relating to the accident. It is true that the history of a case disclosed by an examination of a physician is often made in determining whether a complete diagnosis of the case is made, whether the physician had sufficient data to give an opinion, but under his testimony against the defendant with relation to the cause of the accident, or even the question whether the accident was the cause of the physical injury, where that is an issue in the case; it would be admitting self-serving declarations in the case of statements to a physician.
By Mr. Ross: This does not state that it is the cause of the injury.
By the Court: Yes, I think the objection is good to that.
By Mr. Jamison: If he only stated the fact?

By Mr. BURKS: If the answer is yes or no, if not we desire to urge objection.

253 By Mr. JAMISON: Then they should have filed their objections in writing. The question is correct. He could have answered it, "yes."

By Mr. BURKS: This goes to the competency of the testimony.

By the COURT: Yes, the answer, I think, is competent.

Interrogatory XI.

By Mr. AINSWORTH: The same objection, it is stating the condition of a past transaction.

By the COURT: Let the answer stand.

Interrogatory XIII.

By Mr. BURKS: There is the point. If they had asked this Doctor for his opinion from the symptoms disclosed then this question might have been properly answered, and for the same reasons heretofore stated in our objections to previous questions, the question is based upon

By the COURT: I suppose you are objecting to the hypothetical question put to a medical expert as to the cause of death, and it appearing that the deceased met with an accident, its gravity being a matter of doubt or undetermined, what you want is an element in such question conveying that fact, the fact that an accident had been suffered, brought to the attention of the physician?

By Mr. BURKS: Undoubtedly.

By the COURT: As an aid to the question, what was the cause of the physical condition of the deceased?

254 By Mr. BURKS: Certainly. I submit that if the knowledge attempted to be testified to by the physician, if he has no means of knowing or diagnosis, except from the statements obtained from the deceased, the testimony is absolutely incompetent and is based solely on self-serving declarations.

By Mr. ROSS: This relates to the statements and the diagnosis by the Doctor.

By Mr. BURKS: The word "statements" which forms as much a basis of the answer as the word "symptoms" absolutely cloaks the question and makes it improper. Insofar as it relates to "symptoms," that is a different matter. The witness testified that he had not met this man until after the accident, consequently any information that he may have gained was purely hearsay.

By Mr. ROSS: If that rule were applied in all hypothetical questions no questions could be applicable. His diagnosis is afterwards and based upon the symptoms and the statements of the man being treated. How, otherwise, could he learn anything about it?

By the COURT: I think, perhaps, the extreme limit of such a question would be this: That the physician might testify from the history of the patient, the statements made as to his having received an injury, together with his condition prior and subsequent to that injury. He might state in his opinion such a condition was due to

255 such an injury, but as to the witness stating it was due to a particular injury, the details of which were obtained from the injured takes it without the rule.

By Mr. JAMISON: It is competent for counsel to put cross questions to that in order to determine if any statements were made representing the history of the case that were not true.

By the COURT: That does not aid the Court in the determination of the law whether this question and answer are admissible. The Court is bound to rule upon it as though the witness were on the stand and the answer before the Court. I think it would be hearsay to admit this statement and probably reverse your case if you get a judgment.

By Mr. JAMISON: A medical witness may base his opinion upon the history of a case given him by his patient.

By the COURT: Yes, we do not know what importance the witness would attach to the violence, I mean the extent of the injury, the distance he might have been thrown; the question whether he might not have been thrown against something in the nature of a rock, railroad iron, or something of that sort; whether or not a man was precipitated upon him. All those things which he would have to take as true or untrue as he believed the statements of the patient. The extent of the bias which may have been inflicted upon the patient at the time may have had a potent influence in his reaching the
256 conclusion that it was due to that particular injury.

By Mr. JAMISON: That should be reached then by cross questions: Did he state so and so, and see whether he did make any examination.

By the COURT: Yes, it would be making this witness a double witness against them. This man might relate a lot of things that would be damaging to the defendant. It would put upon them the hazard of having very damaging testimony go to the jury upon a mere matter of determination of the competency of this evidence.

By Mr. ROSS: Suppose this witness were on the stand and we were endeavoring to ascertain whether he was competent to testify to such things. He can ask him if the statements were made to him. Yes. Did you examine him? Yes. The other side must find how reliable that testimony is.

By the COURT: That would not be fair nor just at all. That would simply open the door, if he were a biased witness and wanted to damage the cause of the defendant, to put in the statements and all other malice possible, if it were with malice.

By Mr. ROSS: If it appeared that an untrue statement was made to him, that goes to the weight of the evidence, or competency.

By the COURT: Not if the deceased stated that to his physician. It won't do to say the objection is not good because cross ex-
257 amination might disclose that the witness is incompetent to answer the question. The question must be or appear competent on its face and the answer competent on its face. The objection is sustained.

By Mr. JAMISON: I should like to present some authorities.

By the COURT: No, I will take chances on this being good or bad law. If you have the authorities immediately I will be glad to look at them, but cannot suspend the case.

Interrogatory XIV.

By Mr. BURKS: We object to that

By the COURT: Yes, the same ruling must necessarily follow.

By Mr. JAMISON: In reference to the deposition of Dr. William H. Ward which we now offer, a motion is on file that certain cross interrogatories be suppressed, the grounds of the motion being stated.

By the COURT: The Court holds that the motion should be ruled on at the time of reading the interrogatories.

By Mr. ROSS: We have a motion which applies to some of the cross interrogatories and the answers thereto of Dr. Ward.

By the COURT: Make them as you proceed.

By Mr. ROSS: We believe that the objections to the manner and form should be taken in advance.

Mr. Jamison reading the interrogatories and Mr. Ross reading the answers. All interrogatories and answers thereto were read
258 except those objected to and as to whether those were read or not depended on the ruling of the Court.

Answer to interrogatory VIII.

By Mr. ROSS: I will submit that to the Court before reading. It appears to be all right. It appears to be a fact not denied.

By Mr. AINSWORTH: As to what Sanders said as to the past transaction we object to that particularly.

By the COURT: Do you object to that answer to interrogatory VIII?

By Mr. AINSWORTH: Part of it we do. As to what Sanders said to him. We have no objection as to what Dr. Ward said in his examination he found, but what Sanders said to him.

By the COURT: Yes, I don't think it is important any way except as to the time.

Interrogatory XIV.

By Mr. AINSWORTH: To that we object unless answered by yes or no.

A. Yes, he did.

Interrogatory XV.

By Mr. AINSWORTH: We object to that.

By the COURT: The objection is sustained to that

Interrogatory XVI.

By Mr. AINSWORTH: We object to that on the same ground.

By the COURT: Yes, the objection is sustained.

Interrogatory XVII.

By Mr. AINSWORTH: That is objected to.

259 By the COURT: No, he stated the answer.

By Mr. JAMISON: I submit it should be read.

By the COURT: That has been read. The witness cannot make his own statement competent by referring to that.

By Mr. JAMISON: I ask——

By the COURT: "I have already stated his condition to the best of my knowledge." In answer to the VIII interrogatory. That is what he refers to evidently. I think that is there.

Well, what about the Cross Examination?

By Mr. BURKS: We don't care anything about it, unless they insist on it.

By Mr. AINSWORTH: We don't care whether we put it in or not now.

The first two interrogatories and answers were read by Messrs. Jamison and Ross.

By Mr. JAMISON: We now introduce the deposition of Dr. John W. Foss.

Interrogatories read by Mr. Jamison and the answers by Mr. Ross.

Interrogatory XII.

By Mr. AINSWORTH: We object to that unless it is answered by "yes" or "no."

By Mr. Ross: The answer is "He did."

Interrogatory XIII.

260 By Mr. AINSWORTH: We object to that unless the answer is "yes" or "no."

By Mr. Ross: The answer is "He did."

Interrogatory XIV.

By Mr. AINSWORTH: We object to that on the same ground.

By the COURT: The same ruling as before.

Interrogatory XV.

By Mr. BURKS: We object to that on the same ground.

By the COURT: Yes. The same ruling.

By Mr. Ross: That answer would certainly appear to be a competent answer and proper testimony.

By the COURT: You haven't reference to the question?

By Mr. Ross: Of course it does refer to that particular event. There is no doubt about that.

By the COURT: Yes, the objection is sustained. I think that is not proper.

Interrogatory XVI.

By Mr. BURKS: We object to that if your Honor please.

By Mr. AINSWORTH: If it has reference to time we have no objection, but if it has reference to something else we do object.

By the COURT: Does it have reference to time?

By Mr. Ross: Yes. (The answer is read.)

Interrogatory XVII.

By Mr. BURKS: We object to that on the same ground as to the former questions.

By the COURT: What is the objection?

261 By Mr. BURKS: It relates to a time after the event. He stated what the cause of it was.

By Mr. Ross: The position of counsel is that they are absolutely bound——

By the COURT (examining deposition): The answer is incompetent, so the question is objectionable.

By Mr. Ross: Couldn't the date be stated? That should be competent. "When it first appeared." That does not refer to the accident which counsel are so anxious to disassociate from the injury.

By the COURT: The objection is still good.

Interrogatory XX.

By Mr. AINSWORTH: We object to that on the same ground.

By Mr. Ross: Why should not we ascertain when this trouble first appeared. We have not the deceased here to prove it.

By Mr. Burks: That cannot be proved by the statements of the deceased after the occurrence.

By Mr. Ross: He could not have made the statements before and he cannot make them now. We should be able to show that he did make them then. We do not care whether it is connected with this street car accident or not.

By the Court: I think it is competent for him to fix the date, the time, and the statement made to his physician as to that.

By Mr. Ainsworth: The Court will see in a minute the very next question they ask has no reference to this, it has reference to something else altogether different.

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By the Court: This was a statement made by the witness a year after the event?

By Mr. Ainsworth: The Doctor has already stated that this witness was there. I don't know what his testimony is.

By the Court: I think this objection is good. It is made when or at a time when he made an examination for an increase of pension.

By Mr. Ross: I think it would be against his interest. Directly against his interest.

By the Court: I don't know. Disability to entitle one to a pension under the law, I do not think depends on the date of the disability. It is the fact of the disability. I think that is true; wouldn't the age of this man who had been in the service of the United States entitle him to a pension when he is unable to earn a livelihood? I think so.

By Mr. Ross: It would, certainly. We offer to prove by this witness that this trouble originated immediately following March 20th, 1902.

By the Court: I think the statement to be admissible as such would *tho* the statement of a man who wanted to lay all the facts before the Doctor, that is, he states the cause of the injury to enlighten the Doctor that he may be rid of his disease. But if he makes it before a Doctor who is Medical Examiner for the purpose of obtaining an increase of pension, I think it is inadmissible.

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Interrogatory XXI.

By Mr. Burks: That is objected to as immaterial and irrelevant. The statement having been ruled out.

By the Court: If I rule that out there may not be any thing to sustain the Court's ruling.

By Mr. Ainsworth: The ruling is based on what is here, I suppose. The next question is "How he came to make the statement and why."

By the Court: I think it sufficiently appears what the nature of the examination was. It may go out.

Interrogatory XXVI.

By Mr. Burks: If your Honor please, the statements made——

By the Court: O, no, that is based on the post mortem examination. It may stand.

Interrogatory XXVIII.

By Mr. BURKS: To that we object, because one of the foundations of the answer is the very statement that was ruled out.

By the COURT: The objection is sustained.

Interrogatory XXIX.

By Mr. BURKS: We object to interrogatory XXIX for the reasons and upon the ground that that being a hypothetical question
264 it should include all the facts testified to and should include no evidence which has not been testified to; and upon the further ground that it should not be based upon the assumption that testimony attempted to be offered and heretofore rejected would be admitted in evidence on the trial of this case; and that insofar as this particular question is concerned it has all the vices heretofore referred to in the previous part of this objection, and for that reason it is immaterial, irrelevant and incompetent.

By the COURT: I see this question does embrace some matters not testified to.

By Mr. JAMISON: Where? I would like them pointed out.

By the COURT: I don't recall any testimony here with reference to what his wife did.

By Mr. ROSS: Only to the wife's being there and helping take care of him, lifting him up in bed.

By the COURT: What witnesses.

By Mr. JAMISON: De Massey and Gibson.

By the COURT: What witness testified to the length of time he was in bed?

By Mr. JAMISON: De Massey testified that he took his bed when he returned on the 24th day of March and on the 2nd day of April he left and came back and that he was still in bed on the 8th day of April.

By Mr. ROSS: I think that counsel's objection is too general. I ask that he make it more specific, so that we may see what he objects to.

265 By the COURT: The Court will pass upon it.

By Mr. BURKS: It was my object in calling Mr. Ross to the bench to confer with the Judge in regard to the question.

By Mr. ROSS: Yes, we want to find out what is wrong with it. You did not state to me that what was wrong with it.

By Mr. JAMISON: We drew this up with extreme care.

By the COURT: Where is the testimony of the "next day"?

By Mr. JAMISON: Mr. De Massey testifies to that. That they came into camp on the morning of the 22nd; that Mr. Sanders drove Mr. McKee to Wickenburg the next day and returned to camp on the 24th.

By Mr. BURKS: The testimony is that Sanders drove him back to Wickenburg.

By the COURT: I see that. Where is there anything about his having to be assisted?

By Mr. ROSS: I think that testimony appears in another deposition, as I recall it.

By Mr. BURKS: We submit that they cannot base the question

on one witness. It must be based on the testimony of all their witnesses.

By the COURT: They may take the testimony that relates to the same subject matter that is most favorable to themselves.

By Mr. ROSS: If the Court please, the testimony here shows that he had to be assisted out of the wagon, by Mr. Kinsley, when he returned from Phoenix.

266 By the COURT: What other objection have you found to the hypothetical question?

By Mr. BURKS: As I recall it there is no testimony regarding his weight.

By the COURT: Yes.

By Mr. BURKS: Or testimony about the deceased falling upon his back and another man falling on top of him.

By the COURT: Yes, there is testimony tending to establish that fact. You may put the question.

By Mr. BURKS: There is no testimony here to the effect that he was black and blue over the chest and hip, and suffered continuous pain, and expressed fear of internal injury. The next day, the 22nd, accompanied by the man who was thrown with him, he returned to Wickenburg.

By the COURT: Yes, there is testimony tending to establish that fact. You may put the question. (Interrogatory XXIX being then read.)

By Mr. BURKS: Now, inasmuch as this question is not only propounded to this witness but to all the witnesses who will follow we think we should urge again the objections heretofore offered to the question before the Court permits it to be read. The false premises upon which the hypothetical question is based, or the facts included in the hypothetical question which were not testified to are as follows:

First, that the carrying of water in five gallon pails five
267 hundred feet for domestic purposes;

Second, the spitting of blood the night of the injury;

Third, the assistance to help him from the conveyance; that he was confined to his bed two weeks; that he is not permitted to go into the mine alone; that he can no longer perform labor as before the accident, because of exertion producing palpitation of the heart, choking and suffocation; that the bed chamber of himself and wife is changed to down stairs because the climbing of the stairs produced palpitation; that his sleep when lying down is often interrupted by choking and suffocation and is relieved only by his wife, at times others assisting her; that for some time strychnine and other drugs seemed to control the heart action so the patient can do things not requiring much exertion, but drugs finally fail to have the effect of quieting the palpitation; he gradually grows worse until December, 1903, his limbs and feet begin to swell and continue to swell and grow worse until his death on the 6th day of February, 1904, the palpitation, suffocation, choking and vomiting coming on soon after the accident and continued down to his death; and finally, that the question asks for a conclusion as to the probable originating cause of the trouble and suffering for which the patient was

treated, and does not ask the probable originating cause of the trouble from which the patient is alleged to have died. And upon the further ground, that the question as a whole attempts to
268 draw from this witness an opinion and to offer it in evidence as a fact. This is evidence which should be determined by and left solely to the determination of the jury. Upon these grounds we object to the question as being immaterial, irrelevant and incompetent and based upon an improper foundation.

By the COURT: The objection is overruled. Answer the question.

By Mr. BURKS: We except to the ruling of the Court in regard to interrogatory XXIX.

By Mr. ROSS: "My answer to this question will be and is the same as my answer to the last." I presume it should be read as an answer to this question.

By Mr. BURKS: The answer to the previous question is made on the statements made to the witness. This witness cannot direct an improper method of presenting this question to the Court.

By Mr. ROSS: When the statements of the deceased were excluded the opinion was exactly the same.

By the COURT: I doubt very much whether you can attach on one answer for another.

By Mr. JAMISON: That is his answer to this question.

By the COURT: The answer is given to the jury. If the other is stricken out there is nothing to that.

By Mr. JAMISON: The other answer is the answer to this and should go to the jury. He says: "that is my answer to this question." And that is his answer.

269 By the COURT: That answer is not in the case. Suppose the previous part of this deposition had been stricken out and eliminated and the answer had been this. It would be unfortunate but you cannot render this statement of force and effect by restating an answer that is stricken out.

By Mr. JAMISON: The answer was stricken out as an answer to the former question but not to a subsequent question.

By the COURT: Unfortunately, when evidence is stricken out it cannot be brought in again. If it is out, it is out, and that is all there is to it.

By Mr. ROSS: It was not thrown out. It was not admitted. The other question was not allowed to be answered. If a witness were on the stand he could certainly repeat the words which he had not been permitted to to a previous question, when the question is properly put to him. It is a peculiar rule when a witness cannot refer to an answer made before. It saves typewriting and is a very good practice. Such a ruling would have the effect of excluding all our testimony, on that subject, I mean to say.

By the COURT: I will have to revise the ruling on the other question to get it in.

By Mr. ROSS: Isn't it proper——

By the COURT: It is not proper for a witness to answer a question in that sort of way at all. When a question is put to a
270 witness it is his business to answer it. It is, perhaps, unfortunate and sometimes inconvenient to enforce that rule

where you are not present to direct the witness how he ought to answer the question.

By Mr. Ross: To the following interrogatories he makes the same answer, to interrogatories XXX and XXXI. It would leave the interrogatories unanswered, although clear, because typewritten.

By the Court: Yes, the other side must have the advantage of the record. You cannot re-introduce testimony that is stricken out for the purpose of throwing light on subsequent testimony.

The same rule applies to interrogatories XXX and XXXI.

Interrogatory XXXIII.

By Mr. Burks: We object to that on the ground that our objection to interrogatory XXIX was sustained and is referred to in this interrogatory XXXIII.

By the Court: The objection is overruled. Answer the question.

By Mr. Ross: There are some cross interrogatories of that witness:

By the Court: Well, we will take a recess now until half past nine o'clock Monday morning. The jury will bear in mind not to talk about the case nor suffer any one to speak to you about the case during the recess.

271 MAY 25TH, 1908—9:30 o'clock a. m.

(Roll call of the jury, all answering present.)

By Mr. Ross: If the Court please, just as we were about concluding on Saturday, or a little while before we concluded, the question was raised as to the extent a physician might testify or give an opinion based upon statements made to him by a patient or an injured person or deceased. At that time a suggestion was made of filing and submitting to the Court some authorities but they were not at hand. That is an important matter to us in view of the fact that our testimony is by deposition. While we are as anxious as the Court to avoid the introduction of error into the record, nevertheless there are such a number of authorities holding the liberal rule that if the Court feels any doubt about the matter at this time we will be glad to submit the authorities.

By the Court: I will not take the time now to listen to the authorities, but you may hand up the authorities and I will look over them.

By Mr. AINSWORTH: There is a case almost on all fours to the case at bar where the Court sustained our position. We will submit it.

Deposition of Dr. John W. Foss—Cross-examination.

Mr. Ainsworth reading the interrogatories and Mr. Ross the answers.

272 Interrogatory I.

By Mr. Burks: We move to strike out what Sanders said.

By the Court: As to his own physical condition?

By Mr. Burks: Yes.

By the Court: I would eliminate the statements as to the injury, but as to the pain and what the symptoms were I think that is admissible.

By Mr. Ainsworth: What he said about what caused it. He cannot put in on cross examination what he could not put in on direct. That should be stricken out.

By the Court: That part of the answer "and that the condition of the heart was due to an accident received from being thrown from a street railway" will be stricken out.

Answer to cross interrogatory XIV.

By Mr. Burks: We move to strike out the answer to cross interrogatory XIV for the reason and upon the ground that the answer is not responsive. The answer should have been "yes" or "no."

By the Court: Well, I think "no" is the answer to the question. The rest is not responsive.

By Mr. Ross: Our position in relation to that is that the balance of the answer is irrelevant and immaterial and the objections to the response to the question should have been made prior to the trial.

By the Court: I don't think that is all there is to it. I think the objection is good.

273 Answer to Interrogatory XVII.

By Mr. Ainsworth: We object to the rest of the answer, except the "no," and move to strike anything else he said about it, except the "no."

By the Court: That, what he states, is another way of putting the negative.

By Mr. Jamison: He proceeds to state

By the Court: I don't think the answer is objectionable. It may be read.

By Mr. Jamison: We now offer in evidence the deposition of Dr. O. E. Plath.

Mr. Jamison reading the interrogatories and Mr. Ross reading the answers.

Interrogatory XI.

By Mr. Burks: Defendant desires to object to interrogatory XI propounded to witness O. E. Plath on the grounds and for the reasons that the said interrogatory assumed conditions which have not been testified to. Upon the further ground that the question is incompetent, immaterial and irrelevant, and that it calls for an answer upon matters of fact which are the very issues to be determined by the jury. And which amounts, in substance, to asking of this witness what verdict should be returned by this jury. And in that connection we call your Honor's attention to a case reported in 53 N. W. "Briggs vs. Minneapolis Street Railway Co."

(Discussion of the authority.)

274 By the Court: This appears to be a very respectable authority, and which causes me to hesitate.

By Mr. Ross: If your Honor desires to reverse the ruling we will try to satisfy your Honor of the correctness of the position we take.

By the Court: Well, let me have the question and answer.

(Papers handed to Court.) I don't know why this question is not proper. That question is frequently put in a murder case. What may be the cause of the death, an injury or blow on the head.

By Mr. AINSWORTH: This assumes all the facts. If a man is shot through the heart——

By the COURT: No, if he receives a blow on the head and dies a week or a month after that.

By Mr. BURKS: The question is whether that death could have resulted from the blow on the head. Not as to whether a particular blow on a particular man struck in a particular manner, then it is improper, because it calls for the exact question which the jury must pass upon. That is the difference in this hypothetical question; if the question called for an opinion whether a particular result could have been obtained in a particular manner then it might be proper. But in this case, we submit, it is absolutely improper in that it really calls for an answer by the witness in his opinion what verdict the jury should render in this case. Your Honor realizes that
275 the interests of the defendant have been prejudiced in the mean time.

By the COURT: Not unless these facts are supported, and the hypothetical questions are true in fact.

By Mr. AINSWORTH: In that case we recited it has practically the same question. It is on all fours. It is a bad case.

By the COURT: I am aware this case supports your position. As it is put, though, it is a much weaker case, when it comes to the facts, than this case; that is to say the evidence there is very uncertain and meager.

By Mr. AINSWORTH: There is no question but what the man died of it in that case.

By the COURT: It is admitted that the man was suffering and in a precarious condition at the time of the accident.

By Mr. AINSWORTH: Saturday I started twice or three times to make this same objection. Yesterday when I went to Burks' office I told him what I was after. I told him these hypothetical questions were all wrong, absolutely. I don't have reference to this particular kind of case, but to similar hypothetical questions. That is for the jury not the witness.

By Mr. ROSS: If, in the introduction of testimony, we are not permitted to put in testimony to show what occurred and the cause for the jury we would be very much limited. In this case it
276 appears, and the Doctor testified, that he examined the injured person, talked to him and based his opinion on what the man said to him. He testified it could have been caused by coming in contact with a live wire heavily charged with electricity.

By the COURT: I believe that would be a proper question, and I believe the question would be competent if put in this way, if, in the opinion of the expert a condition of the deceased could have been produced by an external injury. The objection that seems to be urged here and considered by the Court is as to whether the jury should say, or whether the expert should be permitted to say whether the particular injury in question was the cause of the death, that

is the question. It is within the range of possibility that the deceased may have suffered other injuries that did not appear in the evidence, and the question does not exclude the probability or possibility of other injuries.

By Mr. JAMISON: The question involves this. A man previously strong, robust and in good health, meets with an accident, the manner of the accident is stated, the history following that accident of his case is stated. These facts making up the history down to the time of his decease. Now, the Doctor's answer then is confined to the case presented to him in the hypothetical question; then what in his opinion was the originating cause of the trouble or his death.

277 The thought never had occurred to me. I have put it on numerous occasions and never heard it questioned before. I have tried a number of these cases.

By the COURT: I think I have admitted similar questions myself. I don't think the objection is even specifically urged on this question. In the absence of this case I would over rule the objection.

By Mr. BURKS: In answer to the objection of counsel, I will say that likewise I have defended a number of these cases. I believe in every instance the answer of the expert has been restricted to whether or not a set of facts testified to and particularly the result of and having followed the accident. That is not what is called for here. If he had stated that hypothetically and then said; under these conditions, Doctor, could that injury have caused death of this man, that would have been a different proposition. They don't confine this to that, in other words they do not ask for an expert opinion, they ask what is the opinion of this expert as to the verdict the jury are to render in this case.

By the COURT: Whether, as a matter of fact, the injury was caused by that accident.

By Mr. ROSS: We asked him to state the cause from the facts assumed. If the facts are not correct his opinion is worth nothing.

By Mr. BURKS: "What was the probable originating cause?"

278 292 By Mr. AINSWORTH: That is what we are sued for, killing a man. The question is, did we kill him?

By Mr. BURKS: It does not say, could the death of this man have resulted from traumatism, that is not what they call upon this witness to answer.

By Mr. JAMISON: Are the jury not confined to the facts assumed?

By the COURT: That is true in any hypothetical question, of course. Well, can't you proceed without a ruling upon this question immediately?

By Mr. JAMISON: Yes, we can proceed for a time.

By the COURT: Of course the same objection would be urged to the next question.

By Mr. BURKS: We submit that before passing to another expert in the examination this question should be determined.

By the COURT: I will overrule the objection then. I can very easily grant a new trial if I find I am wrong. I am more disposed towards making progress.

By Mr. Burks: I merely suggested that for the reason that the same questions are asked of Dr. Palmer as Dr. Plath.

By Mr. Jamison: Now we offer in evidence the deposition of Dr. E. Payne Palmer.

Interrogatories read by Mr. Jamison and the answers by Mr. Ross. (No objections made.)

* * * * * * *

293 Dr. William Dutfield, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. Ainsworth:

Q. What is your name?

A. William Dutfield.

Q. Where do you reside?

A. Los Angeles.

Q. What is your business or occupation?

A. I am a physician.

Q. How long have you been practicing medicine?

A. Since 1893.

Q. What if any school did you graduate from before commencing to practice as a physician?

A. The Medical Department of the University of Philadelphia.

Q. Where have you practiced your profession?

A. The principal portion in Phoenix and Los Angeles. I went to Phoenix either in 1894 or 1895 and I practiced there until two years ago since which time I was in Los Angeles.

294 Q. Were you acquainted with George W. Sanders during his lifetime?

A. I was.

Q. Were you called upon to make an examination of him for his personal disabilities?

A. I was.

Q. State when and where and who was present, giving the first time, if you examined him more than once?

A. I examined George W. Sanders for a pension, and my recollection is that it was in 1897 or '8.

Q. What office, if any, did you hold then?

A. I was a member of the Pension Board.

Q. At what place?

A. Phoenix.

Q. Who were the other members of the Board at that time, if you remember?

A. I think Dr. Sewell was one. I can't remember the full Board. I don't remember positively about Dr. Sewell.

Q. Dr. Sewell and yourself were two members?

A. I think so.

Q. State what you found in that connection?

A. Mr. Sanders was alleged to have lung trouble. My recollection is that we did not find any active lesion. My recollection is that he gave a history of rheumatism. I remember, and the most

vivid portion of this recollection is that he was a man that began tissue changes rather premature for his age. He was like a good many men who had seen service in the army and pioneering a good deal, he was beginning to get arterial sclerosis, a hardening of the arterial system. I won't swear to heart lesion, that matter is
295 not sufficiently vivid in my mind to make a declaration.

Q. When did you examine him again?

A. I examined him with Dr. Brainard (?) in the latter part of 1903.

Q. Where was that?

A. That examination was made in Phoenix.

Q. In whose office?

A. Dr. Foss's office.

Q. What did you find at that time, Doctor?

A. We found a very sick man. The dominant manifestation was a very large and a very much dilated heart, insufficient, unable in other words to do its work. The heart lesion,—the heart pulsation was manifest over a very large area. The pulsation of the carotids was evident which shows a leakage of the aortic valves; there was mitral regurgitation, and the mitral valves of the heart were not closing properly. It was our opinion that there were other valvular lesions which could not be absolutely identified by reason of the terrific sounds heard everywhere. The heaving of the chest and the great pulsation of the heart obscured the sounds so that we could not make a positive designation of what the sounds were, but we did recognize the aortic and mitral lesions. And there were evidences of heart insufficiency, symptoms, want of breath, and I believe there was some swelling of the limbs at that time.

Q. Dropsical?

A. Yes, sir.

Q. At that time was anything said by Sanders to you or you to Sanders of your former examination?

A. Yes.

296 Q. Do you remember what it was?

A. He remembered that I had examined him for a pension.

Q. Was that the only examination you ever made of him? Was that the last and only examinations you ever made of him?

A. Yes, these two.

Q. What did you call that disease that he was then suffering from, is there any medical term for it?

A. He was suffering from chronic endocarditis.

Q. Can you state what are the causes of such a disease?

A. Yes. There are numerous causes for endocarditis recognized by the authorities. Rheumatism is recognized as the most common cause. Alcoholism is next, and syphilis is probably the next. I would put rheumatism, and in the classification with rheumatism we put in a number of acute inflammatory diseases such as diphtheria; then alcoholism and syphilis, and then heart strain. Heart strain is a great cause for endocarditis.

Q. What produces heart strain?

A. Excessive lifting, excessive climbing, excessive running; anything that puts a great strain of blood pressure, increases the blood pressure, produces heart strain.

Q. What would you say of a man climbing ladders two or three hundred feet high?

A. It is very apt to produce heart strain.

Q. What about handling heavy loads and lifting?

A. That sometimes produces heart strain in a diseased
297 heart. It is more apt to than any other.

Q. Have you described as nearly as you can all the things that produce endocarditis?

A. O, I think that covers the ground.

Q. What about traumatism or blows, does that produce it, external blows?

A. I can't imagine an external blow producing a state of chronic endocarditis.

Q. Would a severe jolt or fall cause that sort of a disease?

A. I don't think it would produce it in a healthy heart. You must remember the heart is a muscular organ pretty well protected by muscles and bones and lungs, suspended in the chest. A blow to the heart sufficient to produce trouble of the heart must produce a great deal of other trouble.

Q. Would it in your opinion, a blow on the chest, independent of any secondary cause, produce it; in a perfect heart condition, produce it?

A. No.

Q. What would be the effect on a man if the ventricle of the tricuspid valve of the man were ruptured?

A. He would die.

Q. What do you say as to the rupture of the tricuspid valve?

A. Do you mean a blow sufficient to produce a rupture of the tricuspid valve?

Q. Yes.

A. In the first place it would produce a profound shock in the mind. The man would know he would be seriously hurt. He would have a solar plexus blow. He would have blue finger nails. He would be exceedingly anxious mentally. He would have
298 great air-hunger because the tricuspid valves, in such a rupture would interfere with the circulation of the blood in the lungs, and the blood could not be oxygenated, and that a man would be in a most precarious condition.

Q. How soon would these symptoms manifest themselves?

A. Instantly, of course.

Q. Would he be able to go around, to travel about?

A. O, certainly he would not.

Q. Could he drive for miles in a wagon and travel on a train for miles?

A. No, sir.

Q. What in your judgment would a rupture of that kind, what would be the extent of life thereafter? The rupture of the heart would kill him instantly?

A. Yes, sir.

Q. The rupture of the tricuspid valves?

A. There recorded cases of ruptured valves of the heart, and those men do not live long. Endocarditis immediately sets in and the duration of life is not great.

Q. Doctor, if upon the death of a party suffering from endocarditis the post mortem examination should show, that the heart was abnormally large, its walls abnormally thin, the muscles abnormally soft, the cavities much dilated, some of the valves were incompetent, there was a scar and small bands, showing that nature had attempted to repair the injury and there was an excessive amount of pericardial fluid present, what would you say the man had been suffering from?

299 By the WITNESS: Read that again and what it says about nature repairing the injury. What injury? Put your question a little differently there.

Q. That the heart was abnormally large, its walls abnormally thin, the muscles abnormally soft, the cavities much dilated, some of the valves were incompetent, there was a scar and small bands, showing that nature had attempted to repair the injury and there was an excessive amount of pericardial fluid present.

A. I don't know where the scar was nor the extent of the scar, otherwise it sounds like chronic endocarditis.

Q. What do you mean by chronic endocarditis?

A. A chronic inflammation of the lining membrane of the heart. There are frequently scars and small bands about the valvular lesions of the heart. From rheumatism there are scars and small bands, sometimes lump walls, little vegetations and lacerations, they make scars, they are always present, one or more of these things, in every case of chronic endocarditis.

Q. Suppose, Doctor, that the autopsy showed the following: The anatomical condition disclosed an excessive amount of pericardial fluid present. The heart, abnormally large, its valves abnormally thin, the substance of the heart muscles abnormally soft and friable, the cavities dilated, some of the valves incompetent, the Mitral and Tricuspid valves were incompetent, one of the Tricuspid valves showed small bands of adhesion to the lower wall of the

300 heart. What would you say of that?

A. I would say that is a case of chronic endocarditis with evidence of fatty degeneration.

Q. What is a cause of fatty degeneration?

A. The same cause that causes endocarditis causes fatty degeneration. More particularly, alcoholism and syphilis are the most frequent causes of fatty degeneration.

Q. And if this condition were found: The pancreas was enlarged at the caudal extremity and was adherent in its extremity to the intestine.

A. I should say the man had probably pancreatitis. The adhesions came from inflammation of the same organ.

By Mr. JAMISON: From some injury?

A. Not necessarily at all. He might have pleurisy without in-

jury. You can have pericarditis without injury, and so of all the other organs, or membranes covering the bowels form adhesions without a blow or injury.

By Mr. AINSWORTH:

Q. Suppose this was the case upon an examination of a person, in a post mortem examination: That the pericardium or sack surrounding the heart was filled with a serous fluid which is an abnormal condition. The heart was abnormally large.

By the WITNESS: There is always a serous fluid around the heart. It is not an abnormal condition to have serous fluid around it.

301 By Mr. AINSWORTH: The heart was abnormally large, there were fatty clots present in the heart substance, dilation of the right ventricle, and the Tricuspid valve showed small bands extending from the flap to the inner wall of the heart, the inner walls were pale and broke readily upon pressure?

A. Fatty degeneration was the cause of endocarditis.

Q. The same as the other?

A. Yes, sir.

Q. Doctor, in your opinion, after having these anatomical conditions presented to you upon a post mortem examination, what is it in your opinion as to the conditions being produced by a fall or blow?

By Mr. ROSS: We object to that as leading in form.

By the COURT: Well, possible so. Not objectionably so.

By Mr. ROSS: I withdraw the objection.

A. No.

Q. Doctor, would the conditions as shown by the post mortem examination establish, as you say, that endocarditis would have caused the death of the patient even if no blow or accident had occurred to him?

A. Yes, sir.

By Mr. ROSS: We object to that and move that it be stricken out. That is absolutely immaterial and irrelevant whether that would have caused his death or not. That is no excuse for kiling him.

By the COURT: Notwithstanding, it bears on the question.

302 By Mr. ROSS: Let them ask whether it would have killed him on the day he died.

By the COURT: No, getting at the condition of the man and the seriousness of the heart trouble, that is all to be taken into consideration in the examination. It is quite correct, if the accident hastened the death you have a right to recover if that can be appreciably measured.

Cross-examination by Mr. JAMISON:

Q. Doctor, you have taken quite an active interest in this case, have you not?

By Mr. BURKS: We object to that as immaterial, irrelevant and incompetent, and not proper examination.

By the COURT: The objection is overruled.

A. I don't know that I have taken any more active interest in this case than I would in any other case in which I was made a witness.

Q. When did you reach Prescott?

A. This time?

A. Yes.

By Mr. BURKS: Same objection.

By the COURT: Same ruling.

A. I reached Prescott I believe Wednesday evening.

Q. Did you immediately set about soliciting medical experts in the City?

A. No, I did not.

By Mr. BURKS: We object to that as not proper cross examination.

By the COURT: No, but the interest a witness takes in a case goes to his credibility.

303 By Mr. JAMISON:

Q. At whose request did you come from Los Angeles to Prescott?

A. Mr. W. B. Sherman's.

Q. Who is W. B. Sherman?

A. W. B. Sherman is the stepson of Gen. M. H. Sherman. He is one of the principal owners of the Phoenix Street Railway.

Q. Mr. Sherman is the owner also of a large mileage of street railways in Los Angeles?

A. Yes.

By Mr. BURKS: We object to that.

By the COURT: The objection is sustained.

By Mr. JAMISON:

Q. You are employed by General Sherman are you, in his cases?

A. I am not in any capacity whatever.

Q. You are employed by him in this case?

A. I presume he is to pay me for my time. Somebody is. I am not here for fun. I am too busy to come here for my pleasure.

Q. You say this examination you made with Dr. Brainard of the deceased was in November, 1903?

A. I think so.

Q. About the middle of November, wasn't it?

A. I don't remember exactly. I think it was the latter part of November.

Q. Who was present besides you and Dr. Brainard?

A. My recollection is that Dr. Slusher and Dr. Foss. I think you were there in that vicinity somewhere.

Q. Why was that examination made?

A. I presume the lawsuit was in view.

Q. Wasn't there one pending?

304 A. Yes, it was to determine the condition of the man at that time.

Q. You were employed by the street railway company at that time?

A. I was.

Q. Dr. Brainard was sent here from Los Angeles?

A. I assume he was.

Q. Now, do you know when Mr. Sanders died?

A. I do not.

Q. The evidence shows that it was the 6th day of February, 1904.

A. Yes, sir.

Q. You examined him about three months previous to his decease, it would be about it?

A. According to that calculation, I believe you are correct.

Q. Did he state to you at that time about this accident?

A. Yes, he stated to me.—Yes, he did.

Q. He stated that it occurred the 20th of March, 1902?

A. He did.

Q. That was about eighteen months, about nineteen months prior to your examination?

A. Well, the 20th of March, 1902, to November, 1903, you can calculate that.

Q. Now, you say you found upon that occasion, from the diagnosis made, that the patient was suffering from endocarditis?

A. Yes, sir.

Q. Endocarditis is the inflammation of the inner membrane or lining of the heart, is it not?

A. Yes, sir.

Q. That is caused usually, and more often than otherwise, by rheumatism, as you stated, on your examination in chief, I believe?

A. Yes, sir.

305 Q. And outside of the cause, of being caused by rheumatism it is produced by infection, is it not?

A. Yes, sir.

Q. From gonorrhea, syphilis, and various forms of infectious diseases?

A. You are absolutely correct.

Q. Doctor, which heart, the right or the left, is usually and most always found to be attacked by endocarditis?

A. I can't say "usually" or "most always." You can't say either heart is "usually" or "most always;" that depends on the case. The left heart is considered most frequently the starting point of endocarditis.

Q. It must be considerably involved before the right heart becomes involved?

A. Not necessarily "considerably."

Q. It is so stated by the authorities, is it not?

A. Well, I don't know as to that, but with the primary start of endocarditis, for instance the valvular lesions start, it requires some little time before every valve is involved. That depends on the case and the severity of the onset of endocarditis.

Q. Your testimony in chief has been based upon a case of chronic endocarditis?

A. Precisely.

Q. Now then, may endocarditis be produced from some acute,—or is there such a thing as acute endocarditis?

A. O, certainly.

Q. Then it repairs and the patient may be as strong as ever?

A. Well, I would hate to say as strong as ever, in general terms you may say a man may recover from acute endocarditis.

305 Q. He will not recover from cronic *encod*arditis?

A. He might recover to the extent that a man may live his natural span of life.

Q. What is nature's process of overcoming that inflammation and impaired condition?

A. We must remember that the heart—I don't know as I quite get your meaning, Mr. Jamison, I will try and demonstrate my answer as I understand the question. The heart is a pump and there is a pause between each beat and then is the time when the heart heals. There is damage to a valve or a leak just as there is in any pump with which we pump. If there is a leak in the valve of the heart or the pump there must be more force put on the handle of the pump to get the same quantity of water and more frequent strokes. So it is with the heart. There must be more frequent beats of the heart and more force put on that to carry the blood through the system. Nature comes to the relief of the heart. There is first, however, dilatation of the heart, and a great deal of new muscle and it is known as hypertrophy.

Q. Explain that?

A. It is nothing more than the walls themselves, or a growth of new muscle to overcome the leakage of the heart. That is known as hypertrophy. After a time it is sufficient to maintain the loss of the leakage of the heart. Then it is said to have compensated and is able to do the work required of it, that is an hypertrophied heart.

307 Q. Do you find endocarditis present in a hypertrophied heart?

A. Yes, you will find dilatation and hypertrophy in the same heart.

Q. Isn't the one the reverse of the other?

A. Yes, sir.

Q. Now then, endocarditis results in the thickening of the membrane and walls of the valves, does it not?

A. Yes, sometimes.

Q. Does it not always?

A. Not always.

Q. Those are exceptional cases?

A. There are certain forms—when the heart is compensated that is true.

Q. You also expect to find the valves thin in a case of endocarditis?

A. You are talking about a case of acute endocarditis?

Q. Chronic endocarditis?

A. You may.

Q. Will you point out the authority that lays that down?
A. I guess most any of them.
Q. Will you bring it?
A. I will.
Q. It does not exist, however, in acute endocarditis?
A. The thin walls?
Q. Yes.
A. A thinning of the leaves of the valves?
Q. Yes.
A. No, not generally, there is an inflamatory condition. There is a general thickening of the walls in endocarditis.
Q. Doesn't that thickening continue throughout the chronic endocarditis?
A. Not necessarily.
Q. Chronic endocarditis is a continuation of acute endocarditis, is it not?
A. Certainly, with changes of course.

308 Q. Now Doctor, you have already testified that nature comes in to compensate for an injury to the heart, and that is called hypertrophy?
A. Yes, sir. Nature tries to, Mr. Jamison.
Q. And very often succeeds, doesn't it?
A. That is true.
Q. The patient becomes apparently strong and endures labor and fatigue?
A. Yes, sir.
Q. Now then, suppose that an injury results after such repairment which disturbs that equilibrium, what then follows?
A. Well, there would probably be more trouble and greater inefficiency.
Q. And dilatation of the heart valves?
A. Yes, of the whole heart, or the part affected, the right or the left side, or possibly the walls.
Q. So that a person who then had endocarditis of the heart——
A. It would have to be endocarditis of the heart, Mr. Jamison.
Q. I understand that, but we do not all understand that. Now, Doctor, you have stated that a lesion or a rupture of the valve would set up the trouble again. Now then, might such disturbance not be such that it would at once impair the heart to such an extent that the patient would be disabled relatively, and nature attempting to repair and finally failing, the patient die because of that disturbance from such injury?
A. Yes.
Q. How many stages is there, Doctor, in the progress of a chronic and finally fatal endocarditis?

309 A. I don't know that I understand all of that question, Mr. Jamison, I presume you mean this: Chronic endocarditis by which there is compensation is one stage, the time of the failing of compensation might be called another stage, if that is what you mean?
Q. Isn't the first period that of default?

A. Yes.

Q. That would be natural?

A. Yes.

Q. The next stage would be that of full compensation, as you have stated, default and compensation?

A. There would be a period of insufficiency following the coming on of endocarditis. You can't immediately have compensation immediately following endocarditis, it does not immediately compensate.

Q. The second period, naturally the process proceeds?

A. There would be one of hypertrophy and——

Q. And full compensation?

A. If that were the case, sometimes in endocarditis there never is any compensation, never is any hypertrophy. You can't divide it into periods. You can't always say the case is going to compensate

Q. Then the patient dies?

A. If he has a chronic condition or a condition of insufficiency.

Q. You misapprehend me; I have started out now with a default, it may be arrested and compensation set in?

A. The period of the default of the disease may be arrested and compensation—yes, compensation may come quickly and it may be that the man won't know his heart is insufficient, he may
310 not know that it has not been competent. There must have been sufficient insufficiency to produce symptoms to make the man know it.

Q. The diagnosis of endocarditis is difficult to——

A. No, it is frequently overlooked.

Q. Persons have been found, on post mortem examination have been found with endocarditis when not expected at all?

A. Yes, sir.

Q. And on the contrary persons expected to have it did not have it at all?

A. I don't know about that. It would depend on the examiner.

Q. Doesn't the authorities lay that down?

A That persons supposed to have endocarditis, and on the autopsy were found not to have it?

Q. Yes.

A. I don't think that is the rule at all.

Q. Isn't it the case that the examiner is mistaken and finds after death that he has been mistaken in his diagnosis?

A. Yes, I suppose so.

Q. Isn't the third stage of endocarditis that laid down as the disturbed compensation?

A. I can't get your idea of stages in this thing. If you will tell me what you mean by the third stage I will answer your question.

Q. I mean by the third stage the period of disturbed compensation?

A. Now then, what is the question.

Q. I will try, Doctor, let us assume—As you have testified that the deceased, that you diagnosed his case as chronic endo-
311 carditis?

A. Yes, sir.

Q. We will say now that there had been compensation prior to receiving the injury say in March, 1902?

A. I am not assuming that there had been—you asked a general question, you are now asking a specific question.

Q. I want you to assume it.

A. Assuming then what? I am very sorry I am so obtuse. I can't understand what you are driving at.

Q. I am trying to make myself plain. I think I will put a preliminary question. For what length of time, in your opinion, when you made this examination of this patient in November, 1903, had he been suffering from chronic endocarditis?

A. Do you mean basing it on the examination purely?

Q. Yes.

A. That I can't tell, from the examination alone.

Q. Now the process of such a chronic case, had it been endocarditis, as you found at that time, would have been of considerable duration, would it not?

A. Yes.

Q. It is a slow process, is it not?

A. Relatively. It is not slow when a fellow himself has it, the time goes very fast you know.

Q. It may be accentuated by an injury?

A. Yes.

Q. And death ensue because of such injury?

A. Be more explicit by your questions, just what do you mean by that? Do you mean that death may ensue?

Q. As the result of an injury received to the heart?

A. Yes.

Q. Causing a rupture or a lesion?

312 A. You mean that a case of chronic endocarditis may be so exaggerated that death would ensue?

Q. Yes.

A. I should answer, yes.

Q. And the period of life after the injury would depend upon the extent of the injury to some extent, wouldn't it?

A. Precisely.

Q. And would also depend on the resistive powers of the person injured?

A. Yes.

Q. And of his recuperative powers?

A. Yes.

Q. Now then, Doctor, that disturbed or third period of endocarditis, which I wish to impress upon you is the period during which an injury acts or intervenes.

A. I don't quite get what you are driving at by the "disturbed or third period of endocarditis." Do you mean the period of endocarditis when there is insufficiency when you have leaking valves, when the heart is not sufficient to force the blood and meet the requirements of the system, do you call that the third period that I described?

Q. That third period may result from an injury and cause a leakage?

A. Yes, it may.
Q. Very likely to if there is a lesion as a result of the injury?
A. Assuming there is an injury it very likely would.
Q. That then is the third stage of chronic endocarditis.
A. If you had a patient with endocarditis and the patient receives an injury?

313 Q. I mean chronic endocarditis compensated.
A. And he receives an injury to the valves of the heart?
Q. Yes, and it produces a leakage?
A. Yes, assuming such to be the case, then what?
Q. Then compensation is overcome, is it not?
A. It is very apt to be, certainly.
Q. Then the patient may linger for some time depending on the extent of the injury and the resistive powers?
A. Yes.
Q. And may result fatally very early?
A. Yes, either case.

By the Court: We will now take a recess until half past one o'clock. The jury will bear in mind the admonition of the Court.

MAY 25TH, 1908—1.30 P. M.

Dr. WILLIAM DUFFIELD on the stand:

By Mr. JAMISON:

Q. Doctor, may not mental emotion cause dilation, cardiacal dilation?
A. Not in a previously sound heart. I don't believe so.
Q. Is it not laid down by the authorities that it does, even in a sound heart?
A. I don't think so, Mr. Jamison.
Q. If it is in Cailhe's Differential Diagnosis and Treatment of Disease?
A. I am not familiar with that. I believe there is such a work.
Q. And presumed authority?
A. I presume it is.

Q. I read, "mental emotion is supposed to be one of the 314 causes of idiopathic dilation."

A. We were talking about endocarditis. Dilation where there is endocarditis?
Q. I said cardiac.
A. That may be. I can't agree with it.
Q. You don't agree with it?
A. No, sir.
Q. Have you testified what the result of endocarditis is upon the walls or valves relative to thickening and contraction? Isn't the effect upon the heart of endocarditis to thicken and contract the valves?
A. Well, in general yes.
Q. So then that clinical evidences is directly the reverse of a case and result due to dilation?

A. You can have a thickening of the valves—I don't get what you mean, Mr. Jamison.

Q. In endocarditis the valves are thin?

A. Yes, we will say so.

Q. On the contrary, where it is an acute case of endocarditis the process is one of thickening and contraction as to the valves, is it not?

A. In general, you may say, yes, we have in endocarditis a thinning of the valves as well as a thinning of the walls of the heart in dilation.

Q. That is the reason why the examiner may be mistaken in his examination for endocarditis, that is one of the reasons laid down by the authorities for it?

A. I don't understand it that way. An examiner ought not to mistake and cannot mistake the lesions of the heart. You take an aortic regurgitation and a mitral regurgitation, it is not only what he hears but what his eye sees in the examination.

315 Q. Where that condition is present and those sounds result from such a leakage, and the heart is beating, it is difficult in a case of that kind to diagnose endocarditis?

A. No.

Q. It is not?

A. No, most assuredly not, you must assume it is endocarditis because it is always so, when you have a lesion of the heart you have endocarditis.

Q. Endocarditis is a result of rheumatism and certain infectious diseases, and a rupture may exist where there is no endocarditis?

A. No, it cannot. There must be some inflammation of the endocardium around the rupture.

Q. Endocarditis following a rupture would be the result of the rupture, would it?

A. It might be, for instance, if you stab the heart, or shoot the heart, there must be endocarditis about the wound. An inflammation around the wound would be endocarditis.

Q. There would be a lesion or rupture at once, wouldn't there?

A. Yes. You are coming down to a fine point, inflammation I should say will be there.

Q. Endocarditis is an inflammation of the lining of the heart?

A. Yes.

Q. You could have endocarditis immediately upon a rupture which would result quickly?

A. You can sometimes, if your rupture does not immediately kill.

Q. Then endocarditis, if I understand your position, would follow a rupture?

A. Yes.

316 Q. Well, suppose that this heart was ruptured, that there was a lesion due to this accident.

A. Yes.

Q. Let us suppose that. Now, you would expect endocarditis to be very pronounced some eighteen or nineteen months afterwards when you examined it?

A. Mr. Jamison, there isn't a case on record of the rupture of the heart, otherwise previously healthy——

Q. Don't the authorities lay it down that pugilists who are struck in the chest, that a lesion is caused by it, isn't that laid down by the books?

A. It would be a very serious lesion, wouldn't it?

Q. Isn't it true that it is laid down by the authorities?

A. What is laid down?

Q. That a rupture of the heart has been caused by a blow in the chest over the heart by pugilists upon the breast?

A. Yes, that is true enough. But what happened to your pugilists. What immediately followed that?

Q. Death may or may not have ensued.

A. It was a knockout anyhow.

Q. He took to the floor undoubtedly but he did not die.

A. He didn't get up and walk down town.

Q. Isn't it laid down that previously healthy hearts have been thusly ruptured? Valves?

A. A rupture, was there a leakage?

Q. Possibly, that is true.

A. I may want to get that question read. I would like to
317 have that question read again that I may understand it.

Q. I think you answered it, Doctor, I don't think there is any mistake. It quite agrees with my knowledge of the results. Would you expect the condition of endocarditis found by you and upon this examination in November, 1903, to continue and perhaps become more aggravated until the decease of the patient which occurred the 6th of February following?

A. Yes, sir.

Q. Doctor, the post mortem examination made upon that body after the decease should show, without doubt, a case of endocarditis, if it were present when you made the examination?

A. Yes, sir.

Q. Now, Doctor, what are the evidences that should be found upon post mortem examination of a case of endocarditis?

A. They are virtually stated in the depositions of the physicians as to their post mortem findings. I will submit that as my answer. They show a fairly good description of endocarditis?

Q. Would you expect to find in such a case on post mortem examination fibrous deposits?

A. Yes, and sometimes calcareous deposits too.

Q. The examiner could not be mistaken could he, if he had reasonable intelligence and learning in the profession?

A. Whether endocarditis existed or not?

Q. Yes.

A. No, sir.

Q. Now, Doctor, will you explain the character of the clots that should be found in such a case?

318 A. That is the material, as to the character of the clots after post mortem changes?

By Mr. Ross: That is immaterial, as to the character of the clots in a post mortem examination.

By Mr. JAMISON: No, it is very material.

By Mr. Ross: It is not in the province of a witness.

By the WITNESS: You may find almost any kind of clot, the endocarditis will not have any bearing on the kind or character of clot you find in the heart. I am speaking about blood clot inside the cavity of the heart, Mr. Jamison.

Q. Those blood clots take on a change, do they not, finally becoming harder and becoming even embedded in the walls?

A. No.

Q. O, do they not?

A. We are talking about the blood in the circulation in the cavity of the heart, Mr. Jamison.

Q. I am speaking of a case of the congested condition, of the thickening and contraction, it is because of the contraction that these particles sometimes are quite large, from the size of a bean or even smaller up to the size of a walnut. They become large, do they not?

A. I don't know of any such conditions except in post mortem condition. Your blood is blood while flowing through the cavities of the heart.

Q. You cannot see into the heart until a post mortem examination is made?

A. We do not, generally. O, I know what would be the
349 effect of floating particles, if there was a clot of blood there it would whip out and cut off into the important organs, that is what would happen.

Q. That is what happens and causes death in endocarditis, isn't that a fact?

A. I don't think so.

Q. Don't the authorities so state?

A. I haven't seen any that do. If you have any there I would like to see them. Of course the vegetation on the leaves of the valves whip off and get into the blood current and cause embolus. We are talking, as I understand it, we are talking of the post mortem findings in the heart. Not talking about vegetations in the heart that are whipped off.

Q. In a case of endocarditis aren't those found?

A. Not in all cases. There are different forms of endocarditis.

Q. Will you produce the authority that it is not found in all cases?

A. Vegetations are only one form of valvular lesions.

Q. Will you produce it?

A. I think there is a text book back there that you can find it.

Q. Do you know a System of Medicine by Pepper?

A. Yes, sir; about twenty years old, but a good one though.

Q. A very good authority?

A. Yes, sir.

Q. Isn't it laid down by him that there are three characters or

stages of these clots that are arrested and afterwards found in a post mortem examination?

A. You are talking about vegetation endocarditis. But there are other forms of endocarditis, remember. You are talking about one thing.

320 Q. That would not be chronic endocarditis?

A. Yes, sir; it would be.

Q. Would you not find these vegetable clots in every case of chronic endocarditis?

A. No, you would not.

Q. Now, there are some clots called terminal?

A. I am not familiar with that classification. Those classifications are arbitrary. One writer may have one and another another.

Q. For convenience we will suggest that.

A. Then tell me what you mean by a terminal clot.

Q. This author says: "These clots are found at a period more or less removed from the time of death. It may be that they have been present in the heart many days before the fatal termination is reached, or indeed that the act of dying, when the whole organism is overcome by the numerous conditions which inevitably tend in this direction, is mainly instrumental in their rapid production."

A. That is all right if they form a lesion, there is no difference there.

Q. Do you know these had not that form in the case in question?

A. There is no evidence of any vegetations in the valves. I did not get it in the evidence.

Q. Doctor, the physicians who made the autopsy said positively that there was no evidence found of a rheumatic heart.

By Mr. BURKS: Let us see where that testimony is.

By Mr. ROSS: The 14th cross interrogatory of Dr. Foss.

By Mr. BURKS: That is not in evidence yet.

321 By Mr. ROSS: Yes, it is.

By Mr. JAMISON: That is cut out. That answer was "no," and the Court struck out the rest of the answer.

Q. Doctor, let us assume that the post mortem did not disclose a rheumatic heart——

By Mr. BURKS: We object to that question on the ground that it is assuming a condition not testified to.

By the COURT: That may be true. It is a hypothetical question, and you may assume anything, I presume.

By Mr. BURKS: It is not based upon any hypothesis in the evidence.

By the COURT: You mean it is not assuming anything in the evidence? There is no such testimony in the evidence as yet.

By Mr. JAMISON: Yes, there is other testimony to be read here.

By the COURT: Not on that subject.

By Mr. JAMISON: That part was taken under advisement. There are other depositions here which cover the same question.

By Mr. ROSS: We can test this witness's ability by assuming any set of facts we please. I think that is the rule on cross examination.

By the COURT: Yes, if it is for the purpose of testing his knowledge. But if it is for the purpose of putting a hypothetical question, it is not proper.

322 By Mr. JAMISON:

Q. A post mortem examination would disclose a rheumatic heart?

A. Do you mean that it would disclose whether or not the endocarditis originated from rheumatism?

Q. Yes.

A. No, sir; it would date back many many years and become chronic and no man can testify whether the originating cause was or was not rheumatism absolutely.

Q. I am not asking you——

A. I beg pardon. I thought that was the question.

Q. I ask you whether or not that condition of endocarditis would be observed at the autopsy?

A. What kind of an autopsy?

Q. Upon the heart.

A. Of one who had endocarditis originating from rheumatism?

Q. Not how it originated. If the patient had endocarditis wouldn't it be disclosed to the eye of the examiner?

A. Precisely, you would see the endocarditis.

Q. Now then, the evidence that is laid down of that condition, it is very apparent, is it not, from these clots that some become embedded?

A. Your questions are to me very vague. I can't understand what clots you are talking about or what form of rheumatism you are talking about. Your questions are to me, and I believe to others, rather indefinite. If you can make them more specific I will try and answer them exactly as I understand them. Do you mean clots originating from valves on which there are vegetations?

323 Q. Yes.

A. Well, then my answer is, yes, in such a heart.

Q. Doesn't that class of clot then follow in all cases of chronic endocarditis?

A. No, sir; not by any manner of means. Mr. Jamison, are you talking about acute endocarditis or chronic endocarditis?

Q. I am talking about rheumatic endocarditis. I am talking about that all the time.

A. Very well, what is the question?

Q. Well, you have answered that. Now, Doctor, fatty degeneration almost invariably follows an injury to the heart; that is if persistent, if the injury is persistent and becomes diseased?

A. It is very apt to.

Q. Fatty degeneration is a resultant then, is it not?

A. It is always a resultant of endocarditis?

Q. No, but fatty degeneration may result from any cause which interferes with the heart action and the circulation, doesn't it?

A. It may.

Q. It follows, then, does it not?

A. Not always.

Q. The only cases in which it does not follow then are the fat people? Their hearts may be fat.

A. They may be or may not. A fat man may have a leaky valve and perfectly good heart muscle, hypertorphied.

Q. Indeed that is more generally the rule than where it is a lean man?

A. I presume that is correct. Fat people are more apt to have fatty degeneration than lean people.

Q. Don't the authorities lay down that rule, that is a
324 disease generally excluded to lean people?

A. No, sir.

Q. Doctor, hypertrophy is a healthy condition, is it not?

A. Yes, sir.

Q. So that it is not associated then with a leaky heart necessarily?

A. O, yes; an hypertrophied heart must have a cause for its hypertrophy, it must have a cause for the insufficiency of the heart.

Q. So that in the case of the rupture of a heart, we will say of a sound heart, unless hypertrophy sets up and compensates, you would expect serious results?

A. You would expect dilatation.

Q. Dilatation which would cause a leakage?

A. You are assuming that you have a leakage to start with or an obstruction or some insufficiency of the heart?

Q. That may arise from over-exertion of any kind?

A. Dilatation?

Q. Yes.

A. Yes.

Q. And hypertrophy, must not hypertrophy always follow to compensate for extra exertion?

A. Yes.

Q. It is found very commonly in athletes and those engaged in violent exercises?

A. Yes.

Q. And that does not of course necessarily assume there is a defective heart?

A. Well, there must have been some defect or it would not dilate, if it is hypertrophied it does not follow that there is any defect in the heart. It assumes that the defect is overcome.

325 Q. Now then, Doctor, when there is an injury such as lesion or rupture, nature throws out a process, does it not, and sort of ties in and thickens up to reduce, that causes bands?

A. Yes, and makes a scar. We are assuming this is not a complete rupture, Mr. Jamison.

Q. No. But I am assuming there has been a rupture and upon the post mortem examination you find evidences of bands, etc. present?

A. Yes.

Q. Showing that there had been a rupture?

A. Yes, and if there has been a rupture and there has been new tissue it will show in the scars and new tissue.

time I have stated to cause,—that is no further injury takes place in the mean time; to what would you attribute that condition?

By Mr. BURKS: We object to that on the ground that it is immaterial, irrelevant and incompetent, being a hypothetical question not based upon all the facts testified to. Based upon assumptions which are not borne out by the evidence, in this, that there is no evidence in the record to the effect that the party referred to had not, previous to the injury, suffered from heart palpitation.

By the COURT: The question involves the same sort of proposition as the other questions this morning. That matter is taken under advisement by the Court. It is the same question.

By Mr. JAMISON: I will add this:

Q. That should those facts be found by the jury, then what, in your opinion, was the cause?

328 By Mr. BURKS: We object to that on the ground that it is still incompetent. If certain conditions, certain effects could have been produced by certain causes.

By the COURT: Yes, I have looked over the authorities. There are authorities you produced this morning that would sustain this question, quite a number of them.

By Mr. ROSS: We only had about ten minutes to search. If we had the whole Sunday we could find ample authorities. That is the general rule stated in the general treatises.

By the COURT: I will admit the question.

By Mr. BURKS: Exception.

(The question is then read.)

By Mr. BURKS: We renew our objection because it is a hypothetical question based on a wrong hypothesis.

By the COURT: The objection is overruled.

By Mr. BURKS: Exception.

A. I don't know.

By Mr. JAMISON:

Q. Well, Doctor, we will assume further——

A. There is nothing there to base an opinion on.

Q. Doctor, in addition to what I have stated or assumed, you may assume that this patient continues to grow worse, heart palpitation more violent as time passes, he can't labor as before. This palpitation continues to grow worse, at first the case responds to medical treatment such as the administration of strychnine and the
329 heart action is better, but that finally fails. He continues to grow worse and dies within about twenty-two or twenty-three months from the time of the injury I have stated. In the mean time, however, physicians find that he has lesions, heart lesion, and the autopsy discloses that upon the examination of the heart there was evidences of injury as the moving cause found in scars and bands, to what, in your opinion, would that condition and death be attributable?

By Mr. BURKS: We object to that as immaterial, irrelevant and

Q. That is a traumatic injury?

A. It is an injury due to a blow or a fall, traumatism, it is called.

Q. Now then, Doctor, should you find such scars, would you conclude, upon post mortem examination, that there had been traumatism, scars and bands?

A. No, not necessarily; there are resulting processes in endocarditis not due to traumatism or a fall. That would not show there has been traumatism. If there has been a rupture, then if you find scars, it is fair to assume it is due to that.

Q. Let us assume that in March, 1902, there had been a rupture, traumatic rupture, and upon the post mortem examination following about twenty-two or twenty-three months thereafter you found these scars and bands, what would you conclude?

A. I would conclude they were from the rupture, if I knew there had been a rupture there.

Q. Doctor, let us assume that the person whose heart has
326 been examined at the autopsy had been injured in a fall previously; that he had been in good health with no apparent trouble with the heart; enduring physical exertion without apparent fatigue; was injured in a fall so that heart palpitation sets up soon after and it is discovered that the heart leaks; and upon this post mortem examination you find this traumatic, or this condition showing there had been that traumatic injury from such a fall or otherwise, and that he grew worse from that time until he dies within twenty-two or twenty-three months, what would be a reasonable conclusion?

A. In order to answer that intelligently I must know the symptoms manifested at the time of the injury. I must know something of the man's history in order to answer intelligently.

Q. Doctor, prior to this injury he had been a strong, healthy man?

A. I assume that. I want to know the symptoms at the time of the injury. Immediately following the injury. Let us assume that his heart was perfectly sound and all right. It is stating a hypothetical question. Because nobody can tell exactly what that was without knowing these things. You can't make a reasonable judgment on it.

Q. A man falls upon his chest, thrown some fifteen feet, violently, and who is unable to get up. He is assisted to his feet, and he spits blood that evening, and the next day he spits clots of blood, vomits.
He returns to Wickenburg from Phoenix the next day and
327 goes out to the mine some sixteen miles. He returns to Wickenburg the next day and the next day home when he is exhausted, completely exhausted. He takes to his bed and is confined there two weeks. He suffers with palpitation, suffocation and vomiting. Palpitation he had not experienced before the accident. He is in bed two weeks. When he gets up he finds that he is not able to do physical exertion on account of the palpitation of the heart which produces this suffocation and so on if persisted in. Nothing intervenes between the time of the accident and up to the

incompetent. It is assuming facts which were not brought out in the evidence, and assumes that the autopsy showed evidences of the injury as the moving cause of the condition of the heart.

By the COURT: Yes, state what the autopsy disclosed.

By Mr. JAMISON:

Q. That the autopsy disclosed scars and bands of the heart, about the heart valves. To what would you ascribe the injury and death.

By Mr. BURKS: The objection to that is that it does not put to the witness a correct statement of the conditions of the heart as disclosed by the post mortem examination, and that it segregates, from all the facts testified to, isolated evidence, and therefore the question is incompetent. It does not give the witness the benefit of all the testimony on that subject.

By the COURT: Yes, you should disclose all the evidence. The conditions of the walls of the heart and the valves and so
3330 on. I don't know that it would make any difference but it might.

By Mr. AINSWORTH: The Court noticed that each one of these three Doctors did not give the same description. Palmer gives one, Foss another, and Plath another. Each one adds a new thing.

By the COURT: The condition should be stated fully and fairly.

By Mr. JAMISON:

Q. In addition to the other facts stated prior to the autopsy, let us assume that the autopsy disclosed that "the heart was abnormally large, its walls abnormally thin, the muscles abnormally soft, the cavities much dilated, some of the valves were incompetent, there was a scar and small bands, showing that nature had attempted to repair the injury and there was an excessive amount of pericardial fluid present," and there was also evidence of traumatic injury?

By Mr. AINSWORTH: I think that is a conclusion. Let the evidence disclose it.

By the COURT: Yes, I think so, it is a conclusion of that expert. Leave that out.

By Mr. JAMISON: Omitting the statement, "showing that nature had attempted to repair the injury?"

By the COURT: Yes, and the evidence of traumatic injury.

By Mr. BURKS: We still insist that all the facts brought out by the post mortem examination as testified to by three wit-
3331 nesses in three completely distinct statements is not placed before the witness, and the question is therefore not complete.

By Mr. AINSWORTH: There is another thing now in this case, that should be embodied in this case, the further evidence——

By Mr. ROSS: We don't have to embody the evidence. You put in evidence of course.

By Mr. AINSWORTH: You were putting a hypothetical question upon a part of the evidence.

By the COURT: It is not necessary for them to assume evidence contrary to what they assume to be the facts. Let us get on with

this. I will let the question go in if you will eliminate that matter of traumatic injury.

By Mr. JAMISON: I would like to add also this: "One of the tricuspid valves showed small bands of adhesion to the lower wall of the heart, the walls of the ventricle thin and much dilated?"

By Mr. BURKS: There is no reference made to the mitral valves, the condition disclosed by the autopsy, and it is certainly a very important element in a question of this kind, that the witness can properly base an opinion.

By Mr. ROSS: On cross examination we do not necessarily have to complete the hypothetical question.

By the COURT: Answer the question now, Doctor.

By the WITNESS: Am I to assume that this man was perfectly healthy?

By Mr. JAMISON: Yes, sir.

A. The man died of chronic endocarditis and the accident was an exciting cause, assuming that question, on that assumption, it is probably an exciting cause.

Q. Doctor, what are the symptoms of dilatation?

A. The symptoms of dilatation are, difficult breathing, impaired breathing, shortness of breath upon exertion, sometimes without exertion, sometimes coughing, sometimes expectoration, sometimes there is an influence upon the kidneys, an influence upon the gastric intestinal tract, the liver action impaired, sleep is impaired, in fact the whole mechanism is thrown out of gear when the acute dilatation is sufficient to make insufficiency in the heart.

Q. Palpitation?

A. Yes, sir.

Redirect examination by Mr. AINSWORTH:

Q. Doctor, in your answer to the last hypothetical question what would your answer be if it should be demonstrated that at the time of the accident and prior thereto the party had been affected by lung trouble and suffered from hemorrhages, and that his cough was increasing, and that he raised more from his lungs, and had more constant pain in his chest?

A. Yes, sir.

By Mr. JAMISON: Hold on, there is no evidence in this case whatever at the time of this accident, or any where near it there was such a condition. That there was in 1889.

By the COURT: I think this question is good if the question assumes at the time of the accident he was suffering.

By Mr. JAMISON: I have no doubt that the Doctor answered with that supposition in view.

By Mr. AINSWORTH: Right after the accident he comes in with another affidavit.

By the COURT: Assume the fact testified to by Sanders himself at one time and the other time. Of course there is no technical condition at that time.

By Mr. AINSWORTH: It is supposed to be a condition until the

contrary is proven. Here is a different affidavit in 1900. One is in 1890 and the other is in 1903.

By Mr. JAMISON: Thirteen years apart.

By the COURT: If you will put in these two statements he may answer the question.

By Mr. AINSWORTH: I will put in both with the dates. I will withdraw the whole question.

Q. Now, Doctor, you stated this morning about those examinations?

A. Yes, sir.

Q. Did you state to [illegible] afternoon, whether one or both hearts were dilated?

A. I don't think [illegible] They were both, right and left heart dilated. The heart was [illegible] the right and the left side. It was a dilated heart.

Q. Did Sanders [illegible] anything about this examination?

A. Yes, he did. He told me to the effect of Dr. Brainard that he was thrown from the car and stunned; that he was as-
334 sisted to the car and went from the place where he was injured down to Carter and Washington Avenues, and then walked to the Adams Hotel; that he did not consider himself enough hurt to call a physician, and attended to business the next day, he was stiff and sore but got about some, that was the morning of the 22nd. He took the train for Wickenburg, and then drove across the country in a wagon sixteen miles, and stayed there until the morning of the 25th. I think he said he spat blood on the way from Wickenburg to the mine is my recollection. That was the first blood he spat. The first of any chest or lung symptoms except soreness and pain. He spoke of the fall, as he fell, he was struck by the knee or boot heel of his companion.

By Mr. JAMISON: We object. This party was not called in to consult or advise with him.

By the COURT: This proof is based on admissions against interest.

By the WITNESS: On the morning of the 25th, he told us, he returned to Phoenix and consulted Dr. Ward. Dr. Ward stripped (strapped) his chest with surgeon's adhesive on the hypothesis that he had a broken rib. He returned to the mine on the morning of the 26th and on the morning of the 28th he returned to Phoenix. I don't remember the day he told me he returned to the mine, but about the 3rd or 4th of April he went back to Phoenix again. On the 28th he had these plasters removed, they were so uncom-
335 fortable he required the Doctor to remove them. He was up and around all this time. He consulted Dr. Ward again on the 3rd or 4th of April, and again the latter part of the month, and again about the middle of May. He told me that he went to California that summer. He complained of soreness in his shoulder, I believe the right shoulder. I am not sure as to that. There was nothing said to me about vomiting or other great distress or anxiety at the time of the injury.

By Mr. BURKS:

Q. Doctor, assuming that the facts stated to you by Mr. Sanders were true, and further assuming that on the 7th day of June, 1900, Mr. Sanders stated under oath that he believed himself entitled to an increase of pension on account of the increase of the disability for which he was pensioned, namely: disability for a disease of the lungs the result of measles incurred in the artillery service of the United States while a private in Company "C," 1 Regiment, Ohio Volunteer Light Artillery. That his lung trouble is more severe and that he is affected more severely from slight causes or colds or exposure which last much longer than before. At times when so affected I am unable to do anything for months. I am now suffering nearly as much as when I was having frequent hemorrhages. My cough is increasing and I raise more from my lungs and have more constant pain in my chest and under shoulder blades. Assuming that this statement was made under oath under date of June 7th, 1900, when George W. Sanders, deceased, was
336 forty-nine years of age; and then further assuming that on the 15th day of January, A. D. 1903, when George W. Sanders was aged sixty-two, he made affidavit under oath stating that he——

By Mr. ROSS: Let the facts be stated.

By the COURT: Yes.

By Mr. BURKS: Assuming the facts to be that the same George W. Sanders applied for an increase of pension.

By Mr. ROSS: No, assume that his condition was such and such on a certain day.

By the COURT: Yes.

By Mr. BURKS: Assume then the following: That on the 15th day of January, 1903, he was suffering from increased disability from lung trouble, result of typhoid fever and measles in the army; that he believed himself to be entitled to an increase of pension.

By Mr. ROSS: That is objected to.

By the COURT: Yes, leave that out.

By Mr. BURKS: That he had heart trouble, resultant from typhoid fever and measles incurred in the Military service of the United States while a private in company "C", 1st Ohio Volunteer Light Artillery, during the Civil War. Such heart trouble resultant from typhoid fever and measles having been incurred in the line of duty?

By Mr. ROSS: We object to that. There is no evidence in the record that this is incurred from typhoid and measles, or as a resultant from those. That is for expert testimony.

By the COURT: I suppose he stated that as a fact. It
337 would tend to show it. It tends to bind the party who made it.

By Mr. BURKS: These facts assumed, Doctor, what would you say was the cause of the condition of the heart as disclosed by the post mortem examination?

By Mr. ROSS: We object to that on the ground of insufficient showing.

By the COURT: Assuming the facts heretofore put to the witness by Mr. Jamison to be a part of the same facts.

By the WITNESS: I assume it is due to endocarditis, due to chronic endocarditis of long standing.

By Mr. BURKS:

Q. Suppose a man of sixty years of age who has drawn a pension for twenty years for lung trouble contracted in 1862, and who had suffered from attacks of rheumatism, is thrown from a street car March 20th, 1902, is bruised in various places but no bones broken, who is able to ride at once one and a half miles on the street car and thence to walk one block to a hotel, is up and about the next day, and early in the morning of the following day rides fifty-four miles by train and sixteen miles by wagon, and the following day he rides thirty-two miles by wagon, and who does not consult a physician until two weeks later when to do so he rides seventy miles, who, three months later, is able to and does take a trip to California remaining there from two to three months, and after his
338 return it is found for the first time that he has endocarditis. From this time he grows gradually weaker until his death, February 6th, 1904, (or nearly twenty-three months after the fall), after which an autopsy over the remains is held which discloses that "The pericardium or sack surrounding the heart was filled with a serous fluid; the heart was abnormally large, there were fatty clots present in the heart substance, dilatation of the right ventricle and the Tricuspid valve showed small bands extending from the flap to the inner wall of the heart; the inner walls were pale and broke readily upon pressure", the heart valves abnormally thin, the substance of the heart muscles abnormally soft and friable, the cavities much dilated, some of the valves incompetent; the mitral valves and the tricuspid valves were incompetent; one of the tricuspid valves showed small bands of adhesion to the lower wall of the heart; scar at base of tricuspid valve. Could the heart conditions disclosed by the autopsy have resulted from or been caused solely by the fall sustained nearly twenty-three months prior to the death?

A. No.

By Mr. AINSWORTH: That is all.

Recross-examination by Mr. JAMISON:

Q. Well, Doctor, let us assume that the autopsy disclosed that the lungs were sound, would that alter your opinion?

A. No, not a bit.

Q. Then he still had lung trouble, is that it?

A. Didn't have it then.

339 Q. Did he have heart trouble at the time of the accident, then?

A. Yes.

Q. But the accident then did set it up and made it become active, did it?

A. It may have contributed somewhat or hastened the end that was inevitable, but not very much.

Q. Not very much?

A. No.

Q. He being a strong man up to the very date of the accident?

A. I don't think it was assumed that he was a strong man in this question.

Q. But, Doctor, let us assume then in addition that up to the day of this accident that he was a strong man and enduring labor without apparent fatigue and had up to that time.

By Mr. BURKS: We object to that question. It has been put and answered.

By the COURT: Yes, you stated that.

By Mr. JAMISON: I am putting that question in connection with this question.

By the COURT: They are utterly irreconcilable.

By Mr. JAMISON: The Doctor assumes there was no lung trouble but that there was heart trouble. Now the question is, what would be the condition at the time of the accident?

By the COURT: The two assumptions are irreconcilable. You can't put both at once.

By Mr. JAMISON:

Q. Doctor, suppose the autopsy showed that death was due
340 to acute dilatation, would that affect you- opinion?

A. I was assuming that it did.

By Mr. BURKS: Same objection.

By the COURT: I think you have fully gone into that question.

By Mr. ROSS: We haven't asked the question, assuming that death was due to acute dilatation. We want to get a conclusion upon the statement we put to him.

By the COURT: You are assuming that death was due to another cause.

By Mr. ROSS: He stated a case arising from certain causes.

By Mr. JAMISON: We assume as a fact that the post mortem examination did disclose that death ensued because of acute dilatation.

By the COURT: What is the rest of the question?

By Mr. JAMISON: If that would alter his opinion.

By Mr. BURKS: That has been gone into. They assumed in the first place and examined this witness upon the theory at the time of the accident he was sound. That matter was all gone into and thoroughly discussed. We come along and in our re-direct examination we assume that conditions before that time were true.

By the COURT: Yes, the question assumes the opinion of another witness as to the cause of his death.

By Mr. JAMISON: It assumes the fact, if the jury should
341 find that as a fact.

By the COURT: It must be an opinion. It is not a fact in

the sense that the physical evidence show the facts to have been,—it must be in the nature of an opinion.

By Mr. Ross: Three physicians testified on examination what the opinion——

By the COURT: What was the opinion of them as to the death.

By Mr. JAMISON: What was the anatomical evidence that lead you to that conclusion?

By the COURT: That is clear as to the question. It is an opinion of the witness as to the immediate cause of death. The objection is sustained. Let us get on in this case.

Dr. HENRY G. BRAINARD, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. AINSWORTH:

Q. What is your name?
—. Henry G. Brainard.
Q. What is your business?
A. Physician.
Q. Where do you reside?
A. Los Angeles.
Q. How long have you practiced your profession?
A. Since 1878.
Q. From what college are you a graduate?
A. Rush Medical College, Chicago University now.
Q. Have you had any special work or experience in relation to the diseases of the heart and nervous diseases of men?
342 A. I have had quite an opportunity for hospital experience, nearly ten years. I was assistant superintendent of the Iowa Insane Hospital of nearly nine hundred, four years I was superintendent of the Hospital at Los Angeles, with four hundred and some, and with the Clinical Medical college, Los Angeles, in which there was an attendance of from ten to twenty each day, and I have had quite an extensive private practice.
Q. Did you know George W. Sanders in his lifetime?
A. Yes.
Q. Were you ever called to examine him as a physician?
A. Yes, sir.
Q. When and where?
A. The exact day of November I can't say, I believe the 24th day of November, 1903, at Phoenix, Arizona.
Q. Do you know whether or not that examination which was made by you was made pursuant to an order of the Court?

By Mr. JAMISON: It was not.

By Mr. BURKS: Let the witness answer.

By Mr. JAMISON: You asked him and I state the fact. You can examine him all you want.

By Mr. AINSWORTH:

Q. Who was present at that examination besides yourself?
A. Mr. Sanders, Dr. Foss, Dr. Slusher, I think his name was, Dr

Duffield. I believe Mr. Jamison was there at the time of the examination, he was while we were at the office I believe, and myself.

343 Q. At the time of that examination did you have any talk with Mr. Sanders in relation to his condition, did he at that time give you a statement of the history of his case?

A. He did.

Q. State what he said about it?

A. He said that he came down from Wickenburg to Phoenix on the 20th of March and got off, I under-stood him, at the Capitol Station. I am not familiar with the place where he took the street car that came to town from there. Shortly after getting on the street car, while he sat on the outer seat of the car, he was thrown from the car and struck on the ground. He said he believed in addition to the blow of falling on the ground that he was struck by the knee or heel of his companion who was sitting on the seat beside him; that he was very much shaken up and felt badly but was assisted to arise and rode on the car down town, the distance I do not know. After getting down town he walked about one block to the hotel where he stayed over night. The next day he stayed in Phoenix but was not confined to his bed. On the morning of the 22nd he took the six o'clock train for Wickenburg and his home. That he returned to Phoenix on the 25th of March and consulted Dr. Ward on account of his feeling so badly in his chest and pains in various parts of his body, one of the shoulders and I think he said his abdomen. Dr. Ward at that time put some strips (straps) of plasters on his chest. He returned to Wickenburg and home on the 26th, the day following; that the pain in his chest, the

344 dressing became so unendurable that he returned to Phoenix on the 28th and had them removed and returned home on the 29th. Subsequently he visited Dr. Ward, coming from Wickenburg to Phoenix and staying sometimes a day and sometimes longer. He visited him two or three times in the month of April and once in the month of May. That in the latter part of June he went over to California; that his shoulder gave him so much trouble that he was obliged to have his wife go with him to help him dress and undress. He remained in California about three months and returned to Wickenburg, and then for the first time consulted Dr. Slusher. He further stated that he had never been able to do as much since the injury as he had before. That manual labor about the mine he had been accustomed to doing he found difficult or impossible to do. That he had grown worse intermittently from the time of the injury up to the time I saw him in November. I don't recall now any further statement from him.

Q. Did you make an examination then as to his physical condition?

A. I did.

Q. What did you find, Doctor?

A. We found a man whose breathing was difficult, and who had a rapid pulse; who had swollen feet. And on physical examination we found there was some decided enlargement of the heart extending farther to the left and down to the sixth interspace, beyond the

nipple, where it should be a' out the fifth interspace; also off to the right apparently the heart was enlarged to at least one half
345 beyond its normal size, both left and right. There was a fault in the aortic valves, these valves that hold the blood from jamming and damming up in the system. There was also a fault in the mitral valves which help to hold the blood back in the system; there was also a murmur at that point. The question of the tri-cuspid valve was more difficult to discover. The symptoms were not such as, at that time, to point to an injury of the tri-cuspid valves. In other words the tricuspid valves are those that throw the blood current from the heart into the lungs, and we usually find a very marked dropsical condition of the lungs where that is involved. Where there was, however, an injury of the tri-cuspid valves we could not say because the leakage from the other valves was making so much noise that it was impossible to determine whether the tri-cuspid valves were injured or not. The mitral and aortic valves were both leaking. There was what is known as broken compensation which has been gone over thoroughly. That was the condition we found the man suffering from at that time.

Q. Did you find any symptoms of rupture of the valves at that time?

A. No, sir; I did not.

Q. What about symptoms, Doctor, of acute rupture?

A. The symptoms of a rupture of a valve are immediate and most distressing. It affects the persons very much as when there is a wound in the heart, you would appreciate better. You know the symptoms when a man is shot through the heart, or stabbed
346 in the heart. An injury to the heart valve of any sort disturbs the double action of pumping, and the pumping of blood around through the system is interfered with at once. There is a feeling of impending death, even if it does not occur, and it frequently occurs at once. It produces that profound shock called extremis, or pericardial distress. Weakness of the circulation makes the person believe death is imminent and in some cases death does come at once.

Q. What was the arterial condition of the system at that time?

A. The condition shown throughout the radial arteries and the temporal arteries that we could reach was a hardening of the arteries, spoken of as arterial sclerosis, it is usually a narrowing of the calibre of the vessels. The calibre of the blood vessels are diminished so that the bood does not travel so rapidly. It requires more force to impel the blood through the arteries.

Q. From Mr. Sanders' statement and the history of the case, and your physical examination at that time, what do you say was his trouble?

A. He was suffering from chronic endocarditis with general arterial sclerosis.

Q. What, from his statement made to you at the time, and your examination of him at that time, what, in your judgment, would you say was the cause of that disease at that time?

A. I should say it was that general change in the blood vessels

and in the walls of the heart and valves which are very commonly found with men at middle age and which come on insidi-
317 ously and gradually until broken compensation of the heart power gives way and then with rapidly developing and distressing symptoms.

Q. Doctor, what would be the influence upon a man of his age and the condition that you speak of by climbing ladders and doing heavy manual work?

A. Those things are predisposing to such conditions and increase the danger of breaking compensation, are the cause, oftentime, of breaking compensation.

Q. Can a man ever have that condition without knowing it?

A. Oftentimes.

Q. What are the principal employments that cause this chronic endocarditis, that most often cause this disease?

By Mr. Ross: We object to that because there is no testimony disclosing that the disease is caused by employment.

By Mr. Ainsworth: We have a right to the answer.

A. Yes, the employments which demand the necessity of great physical exertion, that class of cases, the highest in numbers are those of miners and blacksmiths. Any other occupation which requires great physical exertion, intermittent exertion perhaps.

Q. State whether this condition has been more often found——

By Mr. Ross: We object.

By the Court: The objection is sustained.

By Mr. Ainsworth:

Q. State whether it is more frequently found in people who have been employed in the army of the United States, old
318 soldiers?

By Mr. Ross: We object to that as leading?

By the Court: I don't think that is necessarily leading.

By Mr. Ross: State whether it is any more frequently found among old soldiers rather than old sailors, old men or what.

By the Witness: I am prepared to give an answer to that.

By Mr. Ainsworth:

Q. From your examination at the time you made this examination, from your examination of Mr. Sanders at that time, and the statements he made, what, in your opinion did the accident he complained of have to do with this condition?

By Mr. Ross: We object to that. He asks him to pass upon the evidence and determined what should be believed and what should not.

By the Court: Do you mean from these facts assumed?

By Mr. Ainsworth: No, sir; I asked him from his condition at the time he made his examination, the condition of these facts, and from the statement of the whole history of the case, what the accident had to do with the condition he found?

A. I think it may have aggravated his condition.

Q. Aggravated it?

A. Yes.

Q. How much, in your opinion, would it shorten his life, if any?

349 By Mr. Ross: We object to that. He could not answer that question.

By the COURT: How can the jury answer the question then.

By Mr. Ross: They can answer as well as he could.

By the COURT: If the expert cannot, I don't think the jury can. That is a question to be submitted to this jury, whether this accident, if it contributed to his disease materially shortened his life. Then, it seems to me, it is a subject of expert examination. If it is not, then of course the Court could not charge the jury they can recover if they do not find the prosecution's case, the accident, to be the sole cause, inasmuch as it was not the thing that produced death in itself.

By Mr. Ross: When the witness stated the injury aggravated the disease. The presumption is that it hastened the death. How soon would he have died if there had been no injury? If that was the thing that produced his death it did not make any difference whether he would have lived six months' longer or six months less.

By the COURT: Mere aggravation would not be sufficient.

By Mr. JAMISON: If you will examine the case you will find this: That would be competent provided that it was shown at the time of this accident he was suffering from a disease, such as Bright's Disease in the advanced stages, that he must have lived but a few

350 days. But here is a man shown,—and the facts are that he was strong and well up to that very time. Now, to say that a witness may state in such a case,—my opinion is that he would have lived six months or thirty days but for some intervening case, as the Doctor says, of disturbed compensation.

By the COURT: That is for the jury to say. I think it is perfectly competent to determine the extent of the aggravation at any rate if for no other reason. Answer the question.

By Mr. JAMISON: That is on the assumption that no accident occurred to disturb compensation.

A. Yes, the conditions, arterial sclerosis and endocarditis I found in Mr. Sanders were inevitably coming on and fully determined. They very frequently come on in the later years of the fifties and in the early sixties, they are inevitable. How much it shortened his life I cannot tell. Whether it shortened it a day or a week or a month or six months I cannot tell.

By Mr. JAMISON: Or six years?

A. No, it would make a differenceof days or weeks or months at most but not of years.

By Mr. AINSWORTH:

Q. Would he have died in your opinion of endocarditis regardless of the injury as stated to you by him?

A. He certainly would unless intercurrent trouble had carried him off.

351 Q. Doctor, at the time you made this examination, and from the statements made to you by Mr. Sanders at that time, did he, or was he at that time suffering from a rupture of the valve of the heart?

A. I think I answered that question, that he certainly was not suffering from a rupture of the heart.

By Mr. JAMISON: When is that, when you examined him?

A. Yes, sir.

By Mr. AINSWORTH:

Q. Would it, in your opinion, have been possible to stand a rupture of the valves without any more symptoms than he had at the time of the examination? Would it, at the time you made the examination, would it have been possible to have sustained a rupture of the valves at the time he claimed the accident occurred?

A. If prior to the examination I made at the time I saw him, would it have been possible that he had at some time previous had a rupture of the valve?

Q. Yes.

A. I could not say as to that.

Q. From the description he gave of his symptoms after the injury, was it possible for him to have had a rupture of the valve at that time and have no more symptoms than he did?

A. It was not possible.

Cross-examination by Mr. JAMISON:

Q. Doctor, you say, at the time that you examined him, that he had no rupture of the valve of the heart?

A. I did.

Q. Did he have a leaking (leaky) heart?

A. Leaky valves or leaky heart, which do you mean?

352 Q. Leaky valves?

A. Yes, he had numerous leaky valves.

Q. Of course you could not see the heart to know whether there had been a rupture there or not?

A. No.

Q. There was dilatation, was there not?

A. There was dilatation of the heart.

Q. Were you able to state, to determine how long that had been present?

A. No, sir.

Q. You could not determine that?

A. No, sir; not from the examination.

Q. You could not determine whether it followed soon after that accident or not?

A. Do you mean from the examination or the information I described?

Q. I mean from your examination?

A. I could not.

Q. Doctor, you have stated that I was present at this examination. That is correct, is it not?

A. I stated I believed you were there sometime while we were at the office whether during the examination or not.

Q. Wasn't I present through the whole examination?

A. I didn't pay any particular attention to that. You were not a physician. I cannot say.

Q. Was I not there and answered any question asked, and wasn't Mr. Sanders under directions not to make statements? Isn't it a fact that such information as you received of that accident I told to you myself there with Mr. Sanders, that Mr. Sanders didn't do it?

A. I have no knowledge whatever that you made any statement. I asked you no questions about it. I didn't examine you. I
353 was examining Mr. Sanders.

Q. I remained there, did I not?

A. I don't know, sir.

Q. A person with the condition of heart such as you state Mr. Sanders had you say is on the brink of impending evil? That would depend of course, so far as its nearness or distance is concerned, it would depend upon some exciting cause, that is to destroy compensation?

A. I shall have to ask you to put that question again so I may get it clearly.

(The question was read.)

By the WITNESS: Such a condition as Mr. Sanders is said to have had in the autopsy?

Q. No, sir; such a heart as you said he had?

A. At what time?

Q. Are you, Doctor, basing your testimony given here upon the condition of the heart found at the time of this examination in November, 1903?

A. The questions relating to that examination I am basing my opinion on that.

Q. In giving your opinion that a man,—in answer to a direct interrogatory,—who was facing impending evil should have been a man suffering from such a heart as you found Mr. Sanders to have?

A. Not necessarily suffering in like degree in that which I found him, no.

Q. But if compensation had been restored and no exciting cause had intervened to destroy that compensation is it not very often difficult to diagnose a heart such as you state that Mr. Sanders had, endocarditis?

354 A. It is often difficult to disgnose endocarditis. Is that what you call for?

Q. Yes.

A. But not in the condition as when I found Mr. Sanders.

Q. Now, that condition that you found him in was, we will assume some twenty-two months, no, some eighteen months after compensation had been disturbed. That being a fact, would it not have

been difficult, or might it not, to have diagnosed endocarditis prior to that exciting cause which disturbed the compensation?

A. It is always difficult to diagnose endocarditis when any disturbing cause surrounds the heart valves, but if the valves themselves are not disturbed it is not difficult to make a diagnosis.

Q. You found upon this examination that he had a leaky heart?

A. No, I shall ask you what you mean by a "leaky heart" that is an indefinite term.

Q. You found incompetent valves, did you not?

A. Yes, sir.

Q. The blood was escaping too rapidly else not sufficiently returning, or the reverse?

A. You have me now.

Q. The blood was escaping or being propelled from the heart either sufficiently or insufficiently and returning thereto because of some dilation or dilatation?

A. That is past me. I shall have to say I don't know.

Q. Doctor, you are in the employ of General Sherman in this class of cases that he may have on hand, are you not?

A. No, sir.

Q. You came clear over to Phoenix from Los Angeles in
355 November, 1903, to make this examination?

A. The records show that.

Q. That was at the request of General Sherman?

A. No, sir.

Q. At whose request?

A. The request of Mr. Burns.

Q. Mr. Burns is in the employment of General Sherman is he not?

A. I learned so when I got to Phoenix. I had supposed it was a Santa Fe case when I went there.

Q. You are called frequently as an expert on injury cases?

A. Tolerably so.

Q. Mr. Burns is in the employ of the Santa Fe considerable of the time as claim agent?

A. I don't know about that.

Q. Do you know that is his business, generally?

A. I do not.

Q. Now you found the left side of the heart affected, part at any rate, upon your examination in November, 1903?

A. Yes.

Q. And endocarditis is a peculiar disease affecting the left heart, is it not?

A. I don't know what you mean by peculiar, it makes little difference in the source of endocarditis or the form of endocarditis about that.

Q. Its origin mostly is the advancement of rheumatism, is it not?

A. There are types of endocarditis due to rheumatism, or gonorrhoea which sets up rheumatism.

Q. You could not determine from the examination what was the origin in this case?

A. The examination of Mr. Sanders?

Q. That shown upon the examination of the heart, you could not determine it, could you?

A. The examination of the heart and the history of the
356 case I think we can determine it, I think so.

Q. But you could not determine at that time as to what caused the condition that you found, could you?

A. Well, I think I could determine that general condition, so many of the valves being affected and the general condition different, he was certainly suffering from that form of endocarditis as I stated before, arterial sclerosis is a fore-runner and that may be due to alcholism, syphilis, physical strain, gonorrhoea and such things?

Q. The post mortem would disclose that fact, would it not?

A. What fact?

Q. That kind of disease?

A. No, sir; it might possibly by a microscopic examination, whether you had syphilitic trouble and forms other than syphilitic, you might get other pathological conditions or some acute infection as diptheria or scarlet fever.

Q. Might not that condition come up from other causes too?

A. What condition?

Q. Endocarditis?

A. Yes, that may come from a variety of causes besides the rheumatism you mention.

CAPT. JAMES F. BURNS, called as a witness by the defense, being first duly sworn, testified as follows:

Examined by Mr. AINSWORTH:

Q. What is your name?

A. James F. Burns.

Q. Where do you reside?

A. In the City of Los Angeles, Cal.

Q. Were you acquainted with George W. Sanders in his life
357 time?

A. Yes.

Q. When and where did you know George W. Sanders, state the occasion of it?

A. On the second day of October, 1903, I met him at Wickenburg at the McNeil House, I think that is the name of the hotel.

Q. At about what time of the day?

A. It was between four and half past four in the afternoon, I saw him alight from a wagon and walking towards me, towards the corner of the McNeil house, the southwest corner.

Q. Did you have a conversation with him at that time?

A. Yes, I introduced myself and had quite a conversation with him—He knew——

Q. What did you say where he came from?

A. He said he expected me; that he had started from the mine at nine-thirty that morning and had been until that hour, at that time I looked at my watch and it was four-thirty, he had been six hours

and a half or seven hours coming from the mine, he said twelve miles. The reason he was late was that from the recent rains the rocks and debris from the side of the mountain had washed down and they had to repair the road all the way in.

Q. What was his apparent condition at that time, so far as you know?

A. He got down off the wagon in a proper manner, walked to me like a man in normal condition and sat and talked with me for about an hour in a normal condition. I didn't see anything the matter with him.

358 Q. Where did he go then?

A. I think he went to the post office where his son was, he said, George E. Sanders.

Q. Is that the last you saw of him?

A. Yes, that is the last I saw of him. I took the train and came on to this place from there.

Cross-examination by Mr. Ross:

Q. You were at that time employed by the defendant in this case, were you, the Phoenix Railway Company?

A. No, sir; I was in the employ of the Los Angeles Pacific Railway Company.

Q. The Los Angeles Pacific Railway Company is the company in which General Sherman is interested?

A. I think he is Vice President of it.

Q. And he is also President of the Phoenix Railway Company?

A. I don't know that.

Q. You know General Sherman is the principal owner of the Phoenix Railway Company?

A. I have been informed that he owns a majority of the stock of that company.

Q. You went to Phoenix particularly to see Mr. Sanders, did you not?

A. Yes, sir; from Phoenix I went especially to see Mr. Sanders to Wickenburg. I came to Phoenix for other purposes. There were three pending cases or claims, and I came to settle or see about them and to find out about this one.

Q. Against the Phoenix Railway Company?

A. Yes, sir.

Q. You went to see Mr. Sanders?

359 A. Yes, I was general claim agent for that company. My business has been that for twenty years. I was twelve years with the Santa Fe.

Q. I am not criticising your business at all.

A. That has been my business.

Q. This was in October, 1903, some five months before Mr. Sanders died?

A. Yes, that was the day in the afternoon, I talked to him, the second day of October, 1903.

Q. He seemed to be perfectly robust, vigorous and healthy?

A. He made no complaints to me. He told the story as it was told here. About the same as it was related here. No different from that.

Dr. JOHN W. FLYNN, called as a witness by the defendant, being first duly sworn, testified as follows:

Examined by Mr. AINSWORTH:

Q. Dr. Flynn, what is your name?
A. John W. Flynn.
Q. And your business?
A. Physician and surgeon.
Q. Where do you live?
A. Prescott.
Q. Are you a graduate of a medical college?
A. Yes, sir.
Q. And have practiced medicine in Prescott how long?
A. A little more than seven years.
Q. You were not acquainted with George W. Sanders in his life time?
A. No, sir.
Q. And knew nothing about him?
A. No, sir.
Q. Doctor, will you describe what are the causes of endocarditis, so far as your experience tells you?

A. There are numerous causes, the causes that are most
3360 common, I think, are rheumatism, syphilis, alcoholism, and the acute infections like pneumonia, diphtheria, scarlet fever, typhoid fever and heart strain.

Q. Is it caused from traumatism?
A. I have never known of a case, I don't know of a case. So far as I know it is not.

By Mr. BURKS:

Q. Doctor, suppose a man of sixty years of age who has drawn a pension for twenty years for lung trouble contracted in 1862, and who had suffered from attacks of rheumatism, is thrown from a street car on March 20th, 1902, is bruised in various places but no bones broken, who is able to ride at once one and a half miles on the street car and then walk one block to a hotel, is up and about the next day, and early in the morning of the following day rides fifty-four miles by train and sixteen miles by wagon, and the following day he rides thirty-two miles by wagon.

By Mr. JAMISON: That is not correct.

By Mr. BURKS: I understood the man went over on the team the next day and back the same day.

By Mr. JAMISON: No, sir; that is not correct.

By Mr. BURKS: He rides sixteen miles by wagon the next day and sixteen miles back the next day, making thirty-two miles in two days, and does not consult a physician until two weeks later when to do so he rides seventy miles; who three months later is
3361 able to and does take a trip to California, remaining there from two to three months, and after his return it is found for the first time that he has endocarditis. From this time he grows gradually weaker until his death, February 6th, 1904, (or nearly

twenty-three months after the fall), after which an autopsy over the remains is held which discloses that "the pericardium or sack surrounding the heart was filled with a serous fluid; the heart was abnormally large; there were fatty clots present in the heart substance, dilatation of the right ventricle, and the Tricuspid valve showed small bands extending from the flap to the inner wall of the heart; the inner walls were pale and broke readily upon pressure," the heart valves abnormally thin, the substance of the heart muscles abnormally soft and friable, the cavities much dilated, some of the valves incompetent; the Mitral and Tricuspid valves were incompetent; one of the Tricuspid valves showed small bands of adhesion to the lower wall of the heart; scar at base of Tricuspid valve; could the heart conditions disclosed by the autopsy have resulted from or been caused solely by the fall sustained nearly twenty-three months prior to the death?

A. I don't think it could.

Cross-examination by Mr. Ross:

Q. Why don't you think it could, Doctor?

A. The reason I think it could not, Mr. Ross, is this: That the picture there to my mind is death due to dilatation following chronic endocarditis. I don't think such a fall would produce
362 chronic endocarditis.

Q. Would it produce endocarditis at all?

A. If I might explain.—It could only produce endocarditis, in my opinion, by extending the inflam-ation, that is say from the lungs or pericardium setting up pericarditis and endocarditis, to produce pericarditis and endocarditis.

Q. Suppose the heart had such a violent shock as to start inflam-sation, would that produce endocarditis?

A. Inflam-ation of what?

Q. The walls of the heart, the linings?

A. I don't think a fall could set up inflam-ation of the lining of the heart.

Q. Is it possible to injure a heart by a jar from the outside?

A. Yes.

Q. Could rupture be caused in that way?

A. Yes, sir.

Q. You say that physical strain is a cause of endocarditis? Which I believe is a fact?

A. Yes.

Q. That strain need not necessarily arise from the interior of the heart, need it?

A. I don't know that I understand the question.

Q. What I mean to say is that the strain need not necessarily arise from internal pressure, within the heart?

A. I think you have misunderstood,—one cause of endocarditis is strain, I mean long, continued strain of years possibly of hard labor.

Q. It could not be started by a man running a hundred
363 yards in nine and four fifths seconds, might that not start endocarditis?

A. I don't think so.

Q. It is not that character of strain?

A. No, sir; it is a long continued strain.

Q. Isn't endocarditis commonly found in men who have gone through extreme physical strain?

A. Yes, sir.

Q. Do you mean to say, while a long continued strain will produce it that an unusual strain for a few moments or a few hours will not produce it?

A. I don't think so.

Q. Why don't you think so?

A. If I might explain again: The result of chronic endocarditis, or the result of strain——

Q. I am not confining you to chronic endocarditis, either chronic or acute endocarditis.

A. I will answer in this way then: endocarditis resulting from strain is rather secondary to general arterial sclerosis; the immediate effect, not the immediate effect because there may be no immediate effect, the first effect is on the arterial system and works back, so to speak, towards the heart and sets in on the heart itself.

Q. Assume you have it originating.—It commonly comes in the left ventricle because that is the portion of the heart that is apt to stand the greatest strain?

A. Chronic endocarditis originating in strain would begin in the left ventricle.

Q. If on the autopsy it was found that the difficulty of the heart in question was in the right side and not in the left, would
364 that affect your conclusion in the matter that it was caused by chronic endocarditis?

A. No, it would not affect the cause being endocarditis. A. If there were lesions on the right side of the heart and not on the left the strong probabilities are that the cause was not strain?

Q. In your answer to the hypothetical question you took into consideration the fact that the deceased had rheumatism, did you?

A. No I did not. I did not take that into consideration especially.

Q. Did you attempt to determine how that disease originated in the case stated in the hypothetical question?

A. No, sir.

Q. You assumed simply that because he had had lung trouble at some time when he received a pension of four dollars a month and upon his death certain symptoms appeared, that his death resulted from endocarditis, and that the endocarditis was not affected by the accident?

A. No, sir; I did not.

Q. You were taking the lung trouble into consideration, were you?

A. In coming to the conclusion that the cause of death was chronic endocarditis?

Q. Yes.

A. It didn't affect my judgment a great deal.

Q. Your judgment was based upon the autopsy entirely?

A. Not entirely, but from the whole picture stated in the question.

Q. You say rheumatism is the commonest cause of endocarditis?

A. Yes.

365 Q. In the hypothetical question it was stated that he had rheumatism?

A. Yes.

Q. Then you state that you did not consider the fact of the rheumatism as one of the causes of endocarditis, is that correct?

A. Read the question again.

Q. (Question read.)

A. No——

Q. Although you have stated that rheumatism is one of the commonest causes of endocarditis?

A. No, the fact of his having rheumatism did not alter my opinion very greatly, as I explained. I took the whole evidence into consideration.

Q. Why did you say he died from chronic dilatation? Is that from the evidence disclosed by the autopsy? Is that the basis of your statement?

A. The basis of the opinion is what was disclosed by the autopsy, yes.

Q. If on the autopsy it was disclosed that the deceased died from acute dilatation, would that affect your opinion that he died from chronic endocarditis?

A. If he died of acute dilatation?

Q. Yes.

By Mr. Burks: We object to that form of the question. It is based purely on the opinion of some one else.

By the Court: Yes, that is open to the same objection as the other question. It was ruled out before.

By Mr. Ross:

Q. Suppose that the autopsy disclosed evidences of traumatic injury, would that affect your conclusion in this matter?

366 By Mr. Ainsworth: We object to that. That is a conclusion.

By the Court: Yes, he stated the physical evidences particularly. You may ask him this question. From these physical facts, if traumatic injury could have been an exciting cause? That would be a proper question.

By Mr. Ross:

Q. Doctor, what is the effect of endocarditis, does it result in a thickening or a thinning of the walls of the valves of the heart?

A. The first effect is temporary, I might say, thinning and afterwards thickening, this is reported as hypertrophy, and afterwards a thinning which we find in failing compensation.

Q. Then in the autopsy over one who has died of chronic endocarditis, you would expect to find thick or thin walls?

A. Usually thin walls.

Q. Now state what you would expect to find upon the autopsy of one who died of acute dilatation, what you would expect to find shown in the heart?

A. That would depend altogether on the cause of the dilatation, the primary cause.

Q. Assume then that it was a traumatic injury?

A. I don't think one is justified in assuming that that injury would cause it.

Q. I ask you, you understand I don't necessarily state the evidence to you, I am assuming the facts?

A. I beg pardon, sir.

367 Q. I say, assuming that traumatic injury is the cause of acute dilatation, then what would you find in the heart on the autopsy?

A. The principal evidences you would find, you would find a large heart, thin, soft walls; without any other facts those are especially what you would find, without any other facts as to the cause of dilatation.

Q. If the dilatation were confined to one side of the heart this particular evidence would be confined to that particular side of the heart, would it?

A. Necessarily, yes.

Q. The ventricle on that side of the heart then would be abnormally large and the walls abnormally thin?

A. That is on the supposition that only one side of the heart is dilated?

Q. Yes.

A. Yes, sir.

Q. Endocarditis is a resultant disease, resulting from some prior inefficiency as a rule, isn't it, some moving cause?

Q. I don't know that I understand what you mean.

Q. Does endocarditis originate spontaneously in the heart or is it not ordinarily the result of some moving cause?

A. Yes, it is. It is a secondary disease.

Q. The ordinary progress, assuming a case of acute endocarditis that is not compensated and remedied, it becomes chronic?

A. Yes, if death does not ensue.

Q. You say then a person suffering from endocarditis could safely be thrown from a street car and another man light on his chest without particular danger?

By Mr. BURKS: We object to the form of the question it is
368 assuming facts not stated by the witnesses.

By the COURT: The objection is sustained.

By Mr. ROSS:

Q. You state that one suffering from endocarditis may safely be thrown from a street car without any particular danger?

By Mr. BURKS: We object to the form of the question.

By the COURT: The witness did not state that. He might break his neck. You mean without serious aggravation of his trouble?

By Mr. Ross:

Q. Yes, so far as his endocarditis is concerned that would be perfectly safe, would it, in your judgment?

A. State the question again.

Q. Assume a man suffering from chronic endocarditis, would you advise him that he would run no risk, as far as his endocarditis is concerned by being violently thrown from a street car?

By Mr. Burks: We object to the form of the question for the reason that this witness is not being called upon here to testify to what he would prescribe to a certain patient.

By the Court: Yes, that is true.

By Mr. Ross: He said he found that he died of chronic endocarditis and that the injury had nothing to do with it.

By Mr. Burks: I dislike to see the testimony of a witness distorted in a cross examination.

By Mr. Ross: We have a reasonable right to cross ex-
369 amine this witness.

By Mr. Burks: I submit the form of the question should be what would be the result of a specific case.

By the Court: I think the question is objectionable, the objection is sustained.

By Mr. Ross:

Q. Did you state, Doctor, that a man of sixty years of age, suffering from chronic endocarditis would not run any risk of injury to his heart proceeding from endocarditis by being thrown from a street car?

By Mr. Burks: We object to that: "did you state this"?

By the Court: It is characterizing his testimony. You may ask the specific question. It is an argument. You argue the case with the witness. Does this follow because you said this, that something else is true? That is not the way to examine a witness.

By Mr. Ross:

Q. Take a man sixty years of age suffering from chronic endocarditis is thrown from a street car, could his heart be affected by the fall?

By Mr. Burks: We object.

By the Court: He may answer that question.

A. Yes, it might.

Q. In what way?

A. It would aggravate the endocarditis.

Q. The extent of the aggravation would depend on the extent of the shock, would it not?

A. Well, possibly not the extent of the shock, the extent
370 of the force of the blow, so to speak, the extent of the injury.

Q. It would depend on the extent of the injury?

A. Yes.

Q. If it were an injury of considerable violence the disease might be greatly aggravated, is not that true?

A. If there were a great deal of violence; I think it would aggravate considerably. I think that is as strong as one can put it

Q. You say it would aggravate considerably?

A. Considerably, yes, I think that is strong enough.

By Mr. BURKS:

Q. Would the blow necessarily aggravate that trouble?

By Mr. Ross: What blow?

By Mr. BURKS:

Q. Would such a fall as stated in the preceding question necessarily aggravate the case of endocarditis?

A. Not necessarily.

Q. What are the immediate symptoms of the rupture of the valves and when would those symptoms manifest themselves?

A. The symptoms of the rupture of the valves are very decided and would manifest themselves at once.

Q. Assume a man of sixty years of age affected with endocarditis of some standing receives a fall of sufficient force to rupture the tricuspid valve what would be the immediate symptoms?

By Mr. Ross: We object. That question has been gone into and it is not a matter of redirect.

By the COURT: I think that is admissible.

371 A. Profound shock first. That shock is shown of course by pallor and cold sweat, intense pain in the pericardium, *increase paid in the pericardium*, pulse partly lost or very fast and very weak, a great sense of distress. Those are all that occur to me at the present time.

Q. Would the same answer hold true in the rupture of the mitral valve?

A. Decidedly.

Q. Assume a case where a post mortem examination discloses that both the right ventricle and the left ventricle are greatly enlarged, would that have any particular significance as to the standing or the length of the standing of a case of chronic endocarditis?

By Mr. BURKS: We object. There is no testimony here to show that on the autopsy anything was found wrong with the left ventricle of the heart.

By the COURT: Yes, I think there is. The objection is overruled. Answer the question.

A. It decidedly would.

By Mr. Ross:

Q. How long would it take endocarditis to become chronic?

By Mr. BURKS: We object. He did not state the conditions under which this would result.

By the COURT: Let him answer the question.

A. It is very difficult to say, an acute endocarditis, starting with the supposition, Mr. Ross, of acute endocarditis, the acute stage stops, so to speak, when the acute symptoms stop.

372 Q. And then the chronic symptoms begin?

A. Yes.

Q. Then between them, between the acute and the chronic, or intermediate, there is a medical term for it, it means intermediate anyway?

A. There is a term for it, it has slipped my memory.

By the COURT: We will take a recess until nine o'clock to-morrow morning. The jury will bear in mind the admonition of the Court in reference to talking about the case.

MAY 26TH, 1908—9 o'clock a. m.

By Mr. BURKE: If your Honor please I think at this time the defendant has no further testimony to offer for the reason that a request was made by the plaintiff that we might obtain a ruling on the question taken under advisement.

By Mr. JAMISON: We will take up the deposition of Dr. C. F. Plath first. Shall we repeat the question?

By the COURT: If you desire.

Interrogatory XI. (Read.)

By Mr. BURKS: Now the defendant objects to interrogatory XI propounded to Dr. Plath, upon the grounds and for the reasons that this hypothetical question assumes facts which were not in evidence, and it is not based upon all the facts in evidence. In other words it is based upon a wrongful hypothesis and calls for an opinion by the witness on matters of fact which should be determined by

373 the jury, and it amounts in substance to asking the witness to render the verdict which should be rendered by the jury in the case. It is based purely upon the evidence by the plaintiff and not all of that and upon facts not introduced by the plaintiff. This question assumes that upon the return to Wickenburg on the 23rd the deceased *the deceased* took to his bed, which is not a fact. The evidence is that on the following day he drove Mr. McKee to Wickenburg; that on the 25th he returned, and the evidence is to the effect that two days later he went to Phoenix. Dr. Ward's testimony shows that he was in Phoenix on the 25th of March.

By Mr. ROSS: No, he was there early in April.

By Mr. BURKS: There is evidence in this case to show that two days after Mr. McKee was driven to Wickenburg Mr. Sanders went to Phoenix for the purpose of receiving medical treatment.

By the COURT: Was that put in by the plaintiff.

By Mr. ROSS: Dr. Potfield said Sanders told him that. Dr. Ward said he was first called upon early in April by Sanders.

By Mr. BURKS: According to that the deceased would have been in his bed until about the 9th day of April, and the question put to Dr. Ward, his answer was, the second day, I think it was, of April, so that it is absolutely impossible on any theory to assume that the

man was in bed two weeks. That being the fact the question
374 is absolutely improper.

By the COURT: The question is proper if it is based upon the hypothesis of the evidence in the case. If there is a conflict in the evidence on that, that may assume the truth of any statement made by any witness in the case.

By Mr. BURKS: I do maintain this, and I think your Honor will agree with me: Eliminating the inconsistent statements made by two or more of the witnesses, taking the testimony of one witness upon a particular transaction and assuming that to be the fact, never-the-less any hypothetical question based on the evidence must be stated and none of the evidence testified to must be omitted else it will be based upon a false hypothesis.

The COURT: The Court does not take that view of the case. It would be an absurdity to put both alternatives.

By Mr. BURKS: Suppose one witness states a material fact, that should be in the hypothetical question.

By the COURT: Unless there be other evidence which in fact contradicts it. If one witness states that he was in bed two weeks and another states that he was in Phoenix within that time, it would be a controverted question. Now the question is as to whether the deceased was in bed for the time stated in that question, whether there is any evidence sustaining that question. What other fact do you object to?

By Mr. BURKS: I think there has been no testimony introduced
up to this time as to the physical condition of the deceased
375 as outlined in the question. There is no medical testimony on that point. There is no testimony to show when the deceased suffered from more severe palpitation than at first. There is no testimony to show by any one competent to testify what the physical condition was. Furthermore we think if that question is to be put at this time it should assume all the facts which are now before the jury.

By the COURT: No, I will let the evidence go in.

By Mr. BURKS: We object to the ruling of the court, and save an exception.

Answer to interrogatory XI read.

Interrogatory XII.

By Mr. BURKS: If your Honor please, we object to interrogatory XII propounded to the witness O. E. Plath on the same grounds and for the same reasons interposed to interrogatory number XI, and upon the additional ground that the interrogatory is not complete, in that it is a question put by reference to another question and, furthermore, it calls for an answer by the witness as to different observations at different times based upon different theories.

By the COURT: Yes, the objection is overruled.

By Mr. BURKS: Exception.

Answer to interrogatory XII read.

By Mr. JAMISON: Now as to the cross examination?

By Mr. BURKS: We do not care to introduce it.

By Mr. JAMISON: We will then. Interrogatories read by
376 Mr. Jamison and answers read by Mr. Ross:

Interrogatories and answers were read.

By Mr. JAMISON: Now as to the deposition of Dr. E. Payne Palmer.

Interrogatory XI.

By Mr. BURKS: We offer the same objection as to interrogatory number XI of question propounded to Dr. Plath.

By the COURT: The same ruling.

By Mr. BURKS: Exception.

Interrogatory XII.

By Mr. BURKS: The record will be in the same condition as that in the last deposition?

By the COURT: Yes.

By Mr. ROSS: That is all of the direct examination.

By Mr. JAMISON: What about the cross examination?

By Mr. BURKS: We do not care to introduce it.

Cross examination introduced by the plaintiff. Mr. Jamison reading the interrogatories and Mr. Ross the answers.

Answer to cross interrogatory V.

By Mr. BURKS: I move that the latter part of that answer be stricken out as not responsive to the question. It calls for a fact to be answered by yes or no.

By the COURT: Well, it is not a qualification, it is a reason for his answer. I think that is admissible. The objection is overruled.

Answer to cross interrogatory VI.

377 By Mr. BURKS: We move that all that part of the answer to cross interrogatory number VI propounded to Dr. Palmer be stricken out on the ground of its not being responsive to the question. The question is—"State if you know whether or not the heart is more tolerant of lesions caused by disease than those caused by external violence or injury"? That has nothing to do with this case.

By the COURT: Yes, all that part of the answer beginning with, "There were present," is not responsive because that applies to any case and not to this particular case.

By Mr. JAMISON: We submit that there should have been written objections made before the trial.

By the COURT: No, it goes to the competency of the question. It is not responsive. There must be a basis for it in the question.

Interrogatory VII and answer are read, thereupon——

By Mr. ROSS: That is all.

If the Court please, in the cross examination of Mr. Barr there is a statement made by him as to the probable expectation of life of an individual at a certain age. Yesterday Dr. Brainard was permitted to testify as to the probable expectation of the life of the deceased.

By Mr. AINSWORTH: Where did he testify to that?

By Mr. ROSS: He answered such a question.

By the COURT: I do not recall such a question. He may have testified to the question whether the disease would have prob-
378 ably terminated fatally within a particular time, that is another question.

By Mr. Ross: He was asked how much the injury may have shortened his life.

By Mr. AINSWORTH: Yes, and he said it might be days or weeks or months.

By Mr. Ross: That was on the basis of the assumption that he was a sick man. Now we desire to put such a question upon the basis that he was in health, that he was a healthy man.

That is our case in chief.

Dr. C. E. YOUNT, called as a witness in behalf of the defense, being first duly sworn, testified as follows:

Direct examination by Mr. AINSWORTH:

Q. What is your name?
A. C. E. Yount.
Q. What is your business?
A. Practitioner of medicine and surgery.
Q. Where do you reside?
A. Prescott, Arizona.
Q. Are you a graduate of any medical college?
A. Yes, sir.
Q. How long have you been practicing your profession, Doctor?
A. Since 1895.
Q. Were you acquainted with George W. Sanders in his lifetime?
A. No, sir.
Q. Doctor, suppose a man of sixty years of age who has drawn a pension for twenty years on account of physical disability caused from lung trouble contracted in 1862, and who has suffered
379 from attacks of rheumatism. In 1890 his lung trouble has increased, he has pain in his chest and shoulders, being for months at a time unable to do anything, in 1898 he has, in addition to his lung trouble, arterial sclerosis. Thereafter, on March 20th, 1902, he is thrown from a street car and is bruised about the chest, hip and shoulder but no bones broken. He is able at once to ride a mile and a half on the street car then walk a block to the hotel, is up and about the next day, and early in the morning of the following day rides fifty-four miles by train and then sixteen miles by wagon, and on the following day he rides sixteen miles from the mine to Wickenburg, and then the next day rides in a wagon back from Wickenburg to the mine, sixteen miles. Does not consult a Doctor until two weeks later when to do so he rides sixteen miles by wagon and fifty-four miles by train. Three months later is able to and does take a trip to California where he remains from two to three months and after his return for the first time it is discovered he has endocarditis. From this time on he grows gradually weaker until his death February 6th, 1904, after which an autopsy is had which discloses that the pericardium or sack surrounding the heart was filled with a serous fluid, the heart was abnormally large, there were fatty clots in the heart substance, dilation of the right ventricle, and the tricuspid

valve showed small bands extending from the flat to the inner
380 wall of the heart. The inner walls were pale and broke readily upon pressure. The heart valves abnormally thin, the substance of the heart muscles abnormally soft and friable. The cavity much dilated. Some of the valves incompetent; the mitral and the tricuspid valves were incompetent; one of the tricuspid valves showed small bands of adhesion to the lower wall of the heart; scar at base of tricuspid valve. Could the heart conditions disclosed by the autopsy have resulted from or been caused solely by the fall received nearly twenty-three months prior thereto in a street car accident?

By Mr. Ross: Now, we object to this question. I do not recall any testimony of any character which suggests that Sanders was suffering from arterial sclerosis.

By Mr. AINSWORTH: Dr. Duffield expressly testified, said that in 1898 he examined him for a pension and found this condition present. Dr. Brainard testified that when they examined him in 1903 they found the same condition.

By Mr. Ross: Dr. Duffield examined him twice. On the second examination he testified to having found arterial sclerosis and the other affectations of the heart. Dr. Duffield said nothing about the heart in the examination in 1898.

By Mr. BURKS: He said he was suffering from arterial sclerosis.

By Mr. Ross: I would ask Mr. Norviel to look into that and see.

381 By Mr. BURKS: We don't want anything in the testimony that is not in the case. We will ask the reporter to turn to the early part of Dr. Duffield's testimony.

By the COURT: No. I don't think that is necessary. Enter the objection.

By Mr. Ross: Yes, it stated a certain time the deceased first discovered he had arterial sclerosis. He did not discover it.

By Mr. BURKS: That should read, when it was discovered.

By Mr. Ross: We object to the length of time for which the deceased drew a pension or the cause of the pension. Let it be stated that he had lung trouble due to measles, but the fact that he was drawing a pension because of this could not possibly affect Dr. Yount's answer. He is simply asked to pass upon the condition.

By the COURT: If he has admitted it, it is assumed to be a fact the same as any other fact.

By Mr. Ross: The question whether he had drawn a pension could not affect the Doctor's answer.

By the COURT: I think it is admissible. The objection is overruled. Answer the question.

A. No, sir.

By Mr. Ross: Mr. Ainsworth, did you include in that statement the question of rheumatism?

A. Yes, sir.

By Mr. AINSWORTH:

Q. Doctor, in your experience, I will ask you if the ques-
382 tion ever occurred to you or has been brought to your notice as to the frequency of scars in cases of chronic endocarditis?

A. That is one of the methods of determining or diagnosing, from post mortem examination, we could not make a diagnosis if we did not have some evidences of that kind. The deposits occurring around the valves and the growth of tissue depends on whether it has already been compensated or nearly so.

Q. What is the cause of the scars, inflam-atory?

A. The same as in a case of a burn, or nature in its reparative process, and if the case progresses, that is, if the patient lives, there is an absorption there. The first is swelling, later absorption, nature's effort to correct these conditions resulting in a scar, tissues or bands, even going so far as to make special deposits; that is one of the reasons the valves become defective because they become choked up with the new tissues around them.

Q. Are the scars you have mentioned necessarily a result of traumatism?

A. No, sir.

Q. What is the effect of a rupture of the heart?

A. As far as I can learn from statistics a rupture is fatal. There is one case recorded where the patient lived seventeen days.

Q. What is the effect upon the person of a rupture of the tricuspid valve of the heart?

A. The most noticeable symptom, if the patient were conscious, would be subjective of the patient himself, extreme pain in
383 the region of the heart and with that in man and all animals there is a peculiar sense and expression of impending death, the fear of impending death.

Q. Would he be in a condition to — around or walk about?

A. Excuse me, you specified the valve as tricuspid, that being the valve which controls the circulation in the lungs, and cyanosis of the fingers and lips and of the body generally. You would get an immediate and profound effect on the system. Air hunger, rapid breathing, difficult perspiration, and other evidences of collapse.

Q. Would the patient be in a position to walk around, travel and transact business with a rupture of the tricuspid valve?

A. Not immediately.

Q. Or the mitral valves?

A. No, sir; the conditions might be different but very similar.

Cross-examination by Mr. Ross:

Q. In your answer to the hypothetical question put to you by Mr. Ainsworth did you consider, in arriving at your answer, that the deceased had suffered from rheumatism?

A. I did.

Q. Did you consider that he had suffered from Lung Trouble following measles?

A. I did.

Q. Did you consider that he had arterial sclerosis in 1898?

A. I did and that he continued suffering.

Q. Now, if he had lung trouble that would be disclosed on
384 the autopsy?

A. It could be disclosed on the autopsy.

Q. A careful autopsy would disclose that fact?

A. Yes.

Q. An examination of the lungs by a competent physician would disclose whether or not the lungs had been affected, would it not?

A. Yes.

Q. Or whether they were affected at the time of death?

A. Yes.

Q. An examination of the heart would disclose whether or not endocarditis had resulted from rheumatism, would it not?

A. No, sir.

Q. Aren't the symptoms of chronic endocarditis distinguishable?

A. Not from the other types.

Q. They are not?

A. No, sir.

Q. How do you find out to which type a given case belongs?

A. You have to make a primary diagnosis excluding other conditions. If rheumatism was the only disease the man suffered from during life, we would presume it was rheumatic, especially as rheumatism is the cause of thirty per cent. of the cases.

Q. There is a method of finding out to some degree of certainty the cause of endocarditis?

A. Not unless you find it in an acute case where a particular thrombus might be demonstrated.

Q. Explain to the jury how you would explain a case of endocarditis resulting from rheumatism?

A. We would exclude the possible cause or recurrence of
385 any other disease which might cause it.

Q. Just what you mean,—you say you would exclude what? what did you say, what do you mean?

A. If a man had had pneumonia, typhoid fever, if he had tuberculosis, if he had had chorea in his early childhood, I don't believe any man living can say that was due to rheumatism and not to one of these other diseases.

Q. You would determine that matter by history?

A. Yes, if it be an acute condition and the man is suffering from pneumonia, or inflam-atory rheumatism, or typhoid fever, or diphtheria, if the specific organ of that disease, as far as known, is affected, we make the diagnosis, when the endocarditis is primarily caused by the same organism as caused the primary disease.

Q. Endocarditis is not a primary disease?

A. There is a little difference of opinion on that point practically it is not a primary disease.

Q. But is usually considered a resultant disease?

A. Yes, you can find authorities to say it is primary, even they hedge on the question.

Q. Coming back to that hypothetical question and the answer, you would have given the same answer if the question did not have

any reference to previous arterial sclerosis, previous rheumatism or previous lung trouble?

A. And no other disease being mentioned?

Q. Excluding those diseases which were shown by the history of the case and confining yourself to the other evidences
386 disclosed on the autopsy?

A. Yes, I would give the same answer for this reason; that the acts which the patient is reputed to have accomplished immediately after the injury suggests that the injury, I mean the accident, did not produce a fatal injury.

Q. Now, Doctor, in your answer did you contemplate or assume that the deceased had a defective heart at the time of the injury?

A. I contemplated that. I weighed all the evidence in the case and argued or arrived at the conclusion that a man of that age may have had conditions of which he was not cognizant.

Q. My specific question is whether you assumed that at the time of the injury he had a sound heart or a defective heart?

A. Well, from the question I assumed that the conditions pointed to a probable latent condition there which was only manifested or brought out by the injury.

Q. You assumed that the heart was in such condition that the injury might have started up or aggravated the trouble?

A. Yes, sir.

Q. But you did not necessarily assume that the deceased was suffering from endocarditis at the time of the injury?

A. I assumed, yes.

Q. I don't wish to confuse you. Could you answer that question directly, whether you did assume that he was suffering with endocarditis at the time of the injury?

A. I have so many factors in the case. I certainly as-
387 sumed that the heart was not in the condition it might have been in a younger man for the very reason that conditions did grow worse which is presumptive evidence that the conditions were not normal in the heart. The very fact, taking into consideration the small amount of immediate symptoms, or rather the small *moment* the immediate symptoms suggest as pointed out by one of the best authorities, there must have been some cardiac weakness. No, from the factors put into the question I consider that the heart was not normal.

Q. Do you mean it was not a heart normal for a man of thirty, or a heart which would not have been normal for a man of sixty?

A. I mean it was not a heart absolutely normal for a man of sixty.

Q. You don't expect a man of sixty to have a heart as efficient as a man of thirty?

A. Other things being equal I do not.

Q. When you speak of the movements of the deceased immediately after the injury, in reference to the hypothetical question, you will agree, will you not, Doctor, that a man's physical ability immediately following such injury to move about depends somewhat upon the extent of the injury and somewhat upon his own resistive powers?

A. Yes, the injury might have been so great he would not have breathed but once, you might have gradations of that.

Q. The possible extent of the injury runs all the way from a minimum to the maximum?

A. Yes, sir.

388 Q. It might not have been a very great injury?

A. You can't tear loose anything in the heart of a sick man——

Q. I mean at the minimum, such an injury might not be very serious?

A. Yes, sir.

Q. You stated that the scar appearing on one of the valves and the bands which appeared on the inner wall of the heart did not necessarily indicate traumatism?

A. Yes, sir.

Q. Might it possibly indicate traumatism?

A. Not unless shown to have been a tear in the valve proper, if it was from the little columns and cords that comes from those columns I should say it did not indicate traumatism. If they were fresh bands I should say it was from some endocardial deposits or new growth of tissues.

Q. Is it possible, according to medical experience, for a case of endocarditis to be originated by a traumatic injury to the heart?

A. Yes, but it is extremely rare and when it does occur, there is a vast difference of opinion on it; when it does appear it is considered by the best authorities as presumptive evidence of some pre-existing weakness.

Q. It is possible for traumatism to come in contact with a pre-existing weakness and produce endocarditis?

A. Yes.

Q. You state then it is impossible for such a result to follow when there has not been a pre-existing weakness, did you state that?

A. No, sir; I say it is not impossible for a rupture to occur in the valve of a normal heart but the fact that it does occur

389 is evidence, according to one of the best authorities, that there is a pre-existing weakness.

Q. It raises the probability of a pre-existing weakness?

A. Yes, that is the way, because the heart is a muscular organ, surrounded by soft organs, protected in the bony chest, it is one of the few, or last organs possible to rupture under conditions of violence.

Q. What do you mean by a rupture of the heart?

A. I mean a rupture through the heart substance.

Q. When you stated awhile ago that a rupture of the heart is invariably fatal, you were not then speaking of a rupture of a valve?

A. No, sir.

Q. A rupture of a valve is not necessarily fatal?

A. No, sir.

Q. It may be ruptured and compensated for, may it not?

A. Yes, and the symptoms, I don't think any medical man would

mistake those, and the symptoms you narrated in the previous case; they are just as profound as that case you read here in court.

Q. Now, Doctor, we have been speaking of endocarditis. State what you would expect to find upon the autopsy of one who had died from acute dilatation of the heart, say of the right ventricle?

A. No, I don't quite grasp the meaning you wish to convey.

Q. That would lead you to the conclusion that the death was due to acute dilatation?

390 A. I don't know how long after dilatation occurred the death occurred, if that dilatation occurred at once as in a case of trainers after a hundred yard dash there would be altogether different symptoms you would find than if it is an old man in the same condition. Which picture do you want me to give?

Q. Well, are there evidences, clinical evidences common in both classes of cases?

A. There are, very dissimilar.

Q. Take the case you mentioned, resulting as you have stated, what clinical evidences would you find on the autopsy?

Q. You would find it different from what it was. The ventricle walls thin extremely and the ventricle filled with a greater quantity of blood than normally belonged there, there would be local distention of some organ or group of organs resulting from the improper emptying and from the fact that the system is not able to pump the blood through the system as it ought to have been. If you were to examine the valves likely you would find the valves incompetent.

Q. Now take a case of acute dilatation the course of which has been over a period of twenty-two months?

A. Then I would call it chronic dilatation.

Q. State what you would expect to find?

A. I would expect to find the changes of thinning, it might be extreme thinning of the auricles or ventricles or both. Valvular incompetency. We might find the same symptoms we found at first resulting from a weakening heart, because the dilated heart is a weakened heart, the heart being unable to propel the blood through the system properly. The chances are that we

391 would find the heart expelling much more blood than normal, and you may find the heart chambers containing more blood than normally could be held by them, depending on whether or not they were all dilated.

Q. Now dilatation of the heart may result from an extraneous injury, might it not possibly?

A. Not as a primary condition.

Q. No, probably not. It may be set in motion by a primary injury, might it not?

A. Yes, any obstruction, if you press a bone out of place, a backward motion of the heart, or if you injure a lung so badly that you would have the use of but one lung instead of two, there would be heart dilatation.

Q. Going back to arterial sclerosis, in the majority of cases on which side of the heart does endocarditis first appear, following arterial sclerosis?

A. In arterial sclerosis, the artery handling the blood out from the heart would be the aortic, but not necessarily, you would find it on either or both.

Q. Yes, the majority of the cases originate from that source?

A. From arterial sclerosis, yes.

Q. Now an enlarged heart, Doctor, may be entirely without a dilated heart, may it not?

A. Yes, sir.

Q. Hypertrophy is nothing more nor less than the result which follows the exercise of any muscle?

A. Yes, but that may be a natural exercise, as it were, contracted by the patient, or it may be enforced exercise due to some ob-
392 struction.

Q. In either event it is simply an increase of muscular power furnished by nature to compensate for increased exertion?

A. It is nature's effort to prepare a heart to meet the conditions, whatever they are.

Q. That process is perfectly safe so long as it does not go beyond the limits of nature's power of compensation?

A. I don't know whether I quite grasp the meaning of the question.

Q. (Question read).

A. Yes, if I understood the interpretation of compensation. It would be unreal for a man who had a- athlete's heart and old arterial sclerosis, it would be an unreal combination because the strong pump would break the pipes sooner or later.

Q. A large heart is found in the men who do physical labor and athletes, that class of men who are in the habit of physical exercise, unusual?

A. It is not do to unusual exercise, it means steady exercise.

Q. That naturally brings about a case of hypertrophy of the heart?

A. Yes, sir.

Q. It is true, is it not, that a heart which is hypertrophied is more likely to be injured by an unusual demand or strain suddenly put on it?

A. No, sir; I don't take that view. I take the opposite view.

Q. Do you mean, Doctor, in a case of hypertrophy, which is merely an enlargement of the heart toward a point at which the enlargement becomes dangerous, that in such a case the
393 likelihood of serious results from an unusual strain or demand is not greater than in the case of a perfectly normal heart?

A. I don't believe it is. I am taking the hypertrophied heart not in the sense of any diseased condition but in the condition of nature to meet the conditions imposed. I think that would be a better heart than otherwise.

Q. Suppose the enlargement, originally, of a heart doing work but the limit of compensation had been reached wouldn't such a heart be more likely to be injured by a sudden or unusual strain or demand put on it than would a normal heart in which that character of enlargement had not taken place?

A. Where the question supposes an injury occurs?

Q. I am asking the question generally. A sudden and unusual strain put on the heart; I don't care what kind of a strain. As a general proposition isn't it true that the greater risk is involved in the case of the hypertrophied heart I have mentioned, in which the limit of nature's power of compensation has been reached, or probably reached?

A. Now, if I get the idea, the next step is to be dilatation. With this heart as dilated and hypertrophied and the next step, I think you used the word compensation. I think you are using it is a different manner from the manner I use it. If you presume the next step is dilatation then I would have to assume the heart has reached its limit and it would be more susceptible, that then presupposes that this heart has been dilated because of
394 some resistence, some place, sometime, in the heart's trouble. If it did not presuppose that the next step would not be dilatation. After hypertrophy we may have, instead of this thickening of the wall, we may have further enlargement due to stretching that is dilatation. If the heart is between the two points and it has become dilated then possibly it would be more susceptible.

By the COURT: As a matter of interest I would like to ask a question. Assume a case of a heart normal in size and which has not been enlarged or strengthened by unusual exercise, and a case of an athlete's heart where no dilatation has occurred but the heart has simply been enlarged and strengthened by muscular exercise, in which heart would dilatation be more apt to occur under unusual strain? I mean unusual strain measuring the strain as difficult according to the conditions which existed?

A. It would occur in the normal sized heart. For the reason that the excessive muscular development of the heart wall would, in my judgment, be a protection to an athlete's heart. It has been strained to meet just such conditions. It would enable the athlete's heart to stand the strain. That is simply a matter of opinion.

By Mr. Ross, following the court's question:

Q. That it is never-the-less true that an athlete's heart is occasionally injured by a blow or strain?

A. Yes, especially of the training has not been satisfactory. If he has been over-trained or under-trained either.

395 Q. It is also true that hypertrophy may proceed until it reaches a point at which further hypertrophy cannot proceed safely to the patient or owner of the heart?

A. Yes, because if that hypertrophy continued he would have a heart that ought to pump blood, twice the amount of blood and naturally the blood vessels would give way under it.

By the COURT: The injury would begin in the heart?

A. For one other case, assume that when nature cannot take care of it any longer finally the heart gives way, the muscular fibers become thinner and gives way.

By Mr. BURKS:

Q. Doctor, is it not possible for an athlete starting with a perfectly normal heart to undergo what you have referred to as improper training to such an extent that sooner or later unconscious to himself there will have been contracted a case of chronic endocarditis?

By the COURT: I suppose the case resolves itself to this: a man may have endocarditis from any cause without knowing it.

By the WITNESS: Yes, sir.

By the COURT: Is that right?

By the WITNESS: Yes, sir.

By Mr. BURKS:

Q. In an autopsy held over the remains of a man sixty years of age would it be possible to tell whether the man had been suffering from consumption at all unless the lungs were cut into
396 and dissected; I mean tuberculos*es* of the lungs?

A. I think that question is put in a way I will have a little difficulty in taking hold of it.

Q. I will state it conversely then. Would it not be possible for a man to be suffering from tuberculos*es* of the lungs and that fact not be revealed upon the autopsy unless the lungs were opened and cut into?

A. Absolutely.

Q. Now, Doctor, an autopsy is held and discloses the following anatomical conditions: "an excessive amount of pericardial fluid present. The heart, abnormally large, its valve abnormally thin, the substance of the heart muscles abnormally soft and friable, the cavities dilated, some of the valves incompetent, the Mitral and Tricuspid valves were incompetent, one of the Tricuspid valves showed small bands of adhesion to the lower wall of the heart." Would there be present in that heart or disclosed by that autopsy any conditions which would not be common to any case of chronic endocarditis?

A. No.

By Mr. ROSS:

Q. It is also true that a man having endocarditis, without a physician, might be able to discover it?

A. It is possible.

Q. If the autopsy disclosed that the lungs were not diseased, would you then know there had been no pulmonary disease or history?

A. No, sir; I would not know.

Q. You mean there would be old scars which would also
397 disclose it?

A. Yes, sir.

Q. Can you definitely state, according to the best medical experience, how long a case of endocarditis will run before an acute case becomes chronic? Is that a matter depending on circumstances and conditions?

A. I don't think we could state how long.
Q. It would be a presumption?
A. If it begins as an acute condition, that is the way all are supposed to begin. It is a matter of gradation from the acute to the chronic or primary disease symptoms, and it may pass from the acute to the chronic without even the physician noticing it.

Dr. R. N. LOONEY, called as a witness in behalf of the defense, being first duly sworn, testified as follows:

Direct examination by Mr. BURKS:

Q. State your name?
A. R. N. Looney.
Q. You reside in Prescott?
A. Yes, sir.
Q. What is your present occupation?
A. Physician.
Q. How long have you been a practicing physician?
A. 8 years.
Q. Are you a graduate of some recognized medical school?
Q. The Medical Department of Vanderbilt University, Nashville, Tennessee.

By Mr. Ross: We admit Dr. Looney is competent to testify, considering his opportunities for observation, of course.

By Mr. BURKS:

398 Q. Did you know George W. Sanders in his lifetime?
A. I did not.
Q. Suppose a man sixty years of age who has drawn a pension for twenty years for lung trouble contracted in 1862, and who had suffered from attacks of rheumatism, in 1890 his lung trouble had increased, pain in his chest and shoulders, being for months at a time unable to do anything, in 1898, he has in addition to lung trouble, arterial sclerosis, and thereafter, on March 20th, 1902, he is thrown from a street car and bruised about the chest, hip and shoulder, but no bones broken; he is able at once to ride a mile and a half on the street car and then to walk a block to the hotel, is up and about the next day, and early in the morning of the following day rides fifty-four miles by train and sixteen miles by wagon, and on the following day he rides sixteen miles from the mine to Wickenburg and the next day rides in a wagon back from Wickenburg to the mine; does not consult a Doctor until two weeks later, when to do so he rides sixteen miles by wagon and fifty-four miles by train; three months later he is able to and does take a trip to California where he remains from two to three months, after his return for the first time it is discovered that he has endocarditis; from this time he grows gradually weaker until his death, February 6th, 1904, or nearly twenty-three months after the fall. After which an autopsy over
the remains is held which discloses that: "the pericardium or
399 sack surrounding the heart is filled with serous fluid; the heart abnormally large; there were fatty clots present in the

heart substance, dilation of the right ventricle and the tricuspid valve showed small bands extending from the flap to the inner wall of the heart; the inner walls were pale and broke readily upon pressure." The heart valves were abnormally thin, the substance of the heart muscles abnormally soft and friable, the cavities much dilated, some of the valves incompetent; the mitral and tricuspid valves were incompetent; one of the tricuspid valves showed small bands of adhesion to the lower wall of the heart, a scar at the base of the tricuspid valve; could the heart conditions disclosed by the autopsy have resulted from or been caused solely by the fall sustained nearly twenty-three months prior to the death in the street car accident?

A. No.

Q. Assuming the same facts disclosed by the autopsy in the question last referred to were the heart conditions there present different from those which you would expect to find in any case of chronic endocarditis?

A. No.

Cross-examination by Mr. Ross:

Q. You say you never saw George W. Sanders?

A. No, sir.

Q. Never saw his heart, did you?

A. No, sir.

Q. Your testimony in this case is based entirely on the assumed facts which the counsel put to you?

A. Yes.

Q. You stated that that death could not have been caused solely by that fall?

A. Yes.

400 Q. Might death have been accelerated by that fall?

A. The condition might have been aggravated, the endocarditis might have been aggravated by the fall.

Q. Might a case of endocarditis be initiated by a severe fall or tear or strain?

A. I doubt very much whether it could directly. It might be indirectly.

Q. What do you mean by indirectly?

A. Providing an injury to the pleura covering the lungs or pericardium, the covering of the heart, were infected with pus formation, and then have the endocardium infected from that you would have a malignant endocarditis as a result. I doubt very much whether in a normal heart a fall or blow would cause endocarditis.

Q. What do you mean by a normal heart?

A. I mean such as a normal person would have, when the valves are sound and the lining of the heart is sound. Of course, if you have a crippled heart where the valves are diseased, that might aggravate the condition. I doubt it very much, in fact I have seen no authority that claimed it will.

Q. When you speak of a normal heart do you mean a heart normal in size?

A. Yes, I mean normal in all respects.

Q. In answer to that question did you assume a normal heart to exist at the time of the fall?

A. No, sir; I did not.

Q. What sort of a heart and to what extent diseased and how diseased did you assume?

A. That I could not say, I don't know to what extent.

401 Q. Will you explain to what extent the condition of the heart at the time of the fall is assumed by you was abnormal, and in what respect, state in detail?

A. Do you mean the condition of Sanders' heart at the time of the fall?

Q. No names were mentioned in that hypothetical question.

A. I don't know to what extent it might have been diseased. It might not have been diseased at all. It might have been that the arteries were diseased. It says he has arterial sclerosis. The heart might not have been diseased in itself, but evidently from what he said there the arteries were.

Q. So in answering the question you assumed the condition of arterial sclerosis at least at the time of the injury?

A. I did, certainly.

Q. Did you assume that the patient was afflicted with rheumatism at the time of the injury, or the results of rheumatism? Did you assume and consider also that he is said to have had lung trouble resulting from measles?

A. I did.

Q. What do you mean by lung trouble, pulmonary tuberculosis?

A. I do; that is how it is usually spoken of.

Q. If you were to assume that there was no arterial sclerosis, no lung trouble, no rheumatism, would you then give the same answer to the question?

A. I would, yes.

Q. Those matters——

A. Would not affect the answer for this reason; there are so many other things that cause endocarditis.

Q. Did you assume some other things not stated in the

402 question?

A. No, sir; I assumed that the man had endocarditis.

Q. I will ask you to assume that he had none of the previous mentioned diseases, lung disease, arterial sclerosis, or rheumatism, that leaves out of the consideration any moving cause for endocarditis; and I will ask you then whether your answer to the question would be the same?

A. It would be the same.

Q. You reach that conclusion by presuming that he had some history of some moving cause of endocarditis?

A. I didn't get it, Mr. Ross.

Q. You stated a while ago if those things were true, you assumed there were lots of other things that cause endocarditis?

A. Yes, I said that.

Q. I say now eliminating those elements from the question you reach the same conclusion?

A. That he died from chronic endocarditis? Yes.

Q. You reached the conclusion that there was some moving cause other than what is disclosed producing endocarditis?

A. Yes, it is a secondary disease. There are some few authorities stating that it might be primary, but very few. We consider it a secondary disease.

Q. Haven't we had something like a training school going on on the condition of the heart for the last few days?

By Mr. BURKS: We object. It is not proper cross-examination and counsel knows it. It is incompetent and irrelevant.

403 By the COURT: The objection is sustained.

By Mr. ROSS:

Q. You have been studying the heart considerably during the last week, haven't you, Doctor?

A. I have looked up the heart, yes, sir.

H. W. HEAP, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. AINSWORTH:

Q. What is your name?

—. H. W. Heap.

Q. Where do you reside?

A. Prescott.

Q. Mr. Heap, did you reside in Phœnix during the year 1902?

A. Yes, sir.

Q. What business were you then engaged in?

A. Street railway business and water business.

Q. Were you at that time manager of the Phœnix Street Railway Company?

A. 1902? Yes, a portion of it.

Q. In March, 1902, at the time this accident is said to have occurred?

A. No, I wasn't manager in March, I was acting, I had not been appointed.

Q. You were acting manager?

A. Yes, sir.

Q. Are you familiar with the street car line that runs out Washington street and then north and then west of the Capitol?

A. Yes, I built it.

Q. What is the gauge of that road?

A. Standard gauge.

Q. Are you familiar with the cars run on that road?

A. Yes, sir.

404 Q. Are you familiar with the car that was in commission on which Mr. Sanders rode to town?

A. Yes, sir.

Q. Describe that car?

A. It is a single truck car, twenty-two feet long, enclosed in the central part, and with open ends with two seats about three and a

half feet running lengthwise of the car between which the motorman stands. It is equipped with a 12-A-Westinghouse motor.

Q. You say you are familiar with this curve at the northeast corner of the Capitol?

A. Yes, sir.

Q. What kind of a curve is that?

A. A right-angle curve.

Q. Are you familiar with the speed that cars go around that curve?

By Mr. JAMISON: We object to that.

By the COURT: What is that?

By Mr. AINSWORTH: The speed that cars go around the curve.

By the COURT: The admitted speed?

By Mr. AINSWORTH: There has been some evidence here as to the speed the car was going when it struck the curve. I propose to show it is absolutely impossible.

By the COURT: You ask the speed that a car may turn the curve without going off the track?

By Mr. AINSWORTH: Yes, sir

By the COURT: If he knows that he may state it.

By Mr. ROSS: I would like to examine him as to his competency on that point.

405 Q. Have you known cars to leave the track in rounding that curve?

A. Yes, sir.

Q. Have you made any observations as to the speed with which such cars entered the curve?

A. No. I could merely guess at it. I had nothing with which to measure the speed.

Q. Have you seen them enter the curve and leave the track?

A. Yes, sir. I am not positive about that curve, but the same kind of a curve I have seen them do it several times.

Q. You are not positive you have ever seen them leave this particular curve in question?

A. No, sir; not on that particular curve.

By Mr. AINSWORTH:

Q. There are several right angled curves in that track?

A. Yes, in any street car system you have to keep in the street.

Q. You are familiar with the speed the cars make?

A. Yes, sir.

Q. Mr. Heap, from your observation and experience, could, in your opinion, a car running ten miles an hour enter that curve without leaving the track?

By Mr. ROSS: We object to that.

By the COURT: Answer the question.

A. Not a single truck car, no, sir; I don't think it could.

Q. That was a single truck car?

A. Yes, sir.

Cross-examination by Mr. Ross:

406 Q. Mr. Heap, suppose a car entered the curve or approached close to the curve going at a speed of ten miles an hour, just as it enters the curve the motor-man applies the brake violently, would he not then be able to make the curve by means of the application of the brake?

A. I don't gather what you mean.

Q. Would the car not be able to stay on the track by means of violent application of the break as you go into the curve?

A. Not if he struck the curve at a high rate of speed, if he put the brake on before getting to the curve and slacked up he could get around, but ten miles an hour is a tremendnous speed to go around a curve.

Q. It is true, from your experience, that passengers have been frequently thrown from a car at that curve?

A. I don't say frequently. Passengers are continually falling off of cars every where.

Q. They particularly fall off the cars at that particular curve?

A. It is most always at curves, yes.

Q. That company has been sued for more claims than one arising from just such falls at that curve?

By Mr. AINSWORTH: We object to that as incompetent and immaterial.

By the COURT: Yes, that question is perhaps incompetent. The objection is sustained.

FRANK L. WRIGHT, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. AINSWORTH:

407 Q. Mr. Wright, where do you reside?

A. Prescott.

Q. What is your business?

A. Running the lighting business and street car.

Q. How long have you been engaged in the street car business?

A. Three years.

Q. You are engaged in the street car business in Prescott?

A. Yes, sir.

Q. What is the gauge of your street car line?

A. Standard gauge. Four feet eight and a half inches.

Q. Do you use single truck cars?

A. Yes, both my cars are single truck.

Q. Do you have any right angled curves?

A. Yes, sir.

Q. What is the speed, the scheduled speed of your cars running in this town?

A. I guess they run from eight to ten miles an hour, on a straight line, our schedule from Whipple to the end of the line is about two miles and we make it in seven and a half minutes including the stops.

Q. Have you had experience in watching cars to know about their speed in making curves?

By Mr. Ross: We object. I don't believe his experience watching cars and riding on cars is sufficient to enable him to tell the speed of rounding curves.

By the COURT: O, I don't know.

By Mr. AINSWORTH:

Q. Mr. Wright, with a single truck car could you enter a right-angled curve at the rate of speed of ten miles and hour and make the curve?

408 A. No, sir; it would not stay on the track. It might do it with a double truck car, but not with a single truck.

Cross-examination by Mr. Ross:

Q. At what speed could you enter and safely get around your curves?

A. Well, I could not say exactly, we cut our speed down and we almost creep around these curves, probably five miles an hour. I don't think we could that much because a single truck car jumps the track easily.

Q. It is the business of the motor-man to slow up in going around the curves?

A. Yes, he always slows up, yes, sir.

Q. Did you ever run a street car, Mr. Wright?

A. No, sir.

Q. Couldn't you keep the car on the track if just as you enter the curve the brakes are violently applied with full force, suddenly, couldn't you keep the track that way?

A. That depends on the brakes, whether good or not.

Q. Street cars always have good brakes, haven't they?

A. We always try to keep good brakes on them.

By Mr. AINSWORTH: We rest.

By Mr. Ross: In rebuttal we desire to offer the testimony of Dr. Foss contained in his direct examination which is in relation to the statements made to him by the deceased on the occasion of the examination held on the 3rd day of June, 1903, at which time the deceased was examined for an increase of pension. Especially that portion of the testimony which states the time when the

409 trouble with deceased's heart first appeared.

The theory of this being that the affidavit is offered in evidence of a peculiar character, the reading of it is very peculiar. From which it is assumed, and doubtless will be argued by counsel, that the claim of the deceased at the time he applied for an increase of pension was that his heart trouble originated from lung trouble or measles. We think we ought to be permitted to show——

By the COURT: That does not come within any rule of rebuttal or evidence. The statement.

By Mr. Ross: We believe the statement is a part of one matter.

By the COURT: No, it is not rebuttal.

The testimony is thereupon closed.

LEE H. LANDIS, Adm'r,
vs.
PHŒNIX RAILWAY COMPANY.

Charge to Jury.

GENTLEMEN OF THE JURY: The complaint in this cause charges that the plaintiff is the administrator of the estate of George W. Sanders, deceased, and is a citizen and resident of the Territory of Arizona and County of Maricopa; that the defendant, the Phœnix Railway Company, is a corporation organized and doing business under the laws of said Territory, and for cause of complaint alleges that on or about the 20th day of March, 1902, the defendant
410 was the owner of and operating an electric street railway in and though the streets of Phœnix and in the country outside for the carrying of passengers for hire; that on said 20th day of March, the deceased, George W. Sanders, was a passenger on one of the cars of the defendant; that he was lawfully thereon and had paid to defendant its usual and customary fare for transporting him over a portion of its railway; that while the deceased was being so transported the defendant and its employee in charge of and operating said passenger car on which the deceased was riding, negligently, carelessly and unskillfully caused the same to be run into, upon and around a sharp curve in the track on which said car was running, at or near the corner of Adams Street and Sherman Avenue, in said City of Phœnix, at an unusual, high and dangerous rate of speed, by reason whereof said deceased, without fault or negligence on his part, and while in the exercise of due care, was violently thrown from said car to the ground, whereby he was greatly bruised, maimed and injured in his body and limbs and became sick and sore, lame and disordered and so continued by reason aforesaid until the 6th day of February, 1904, when he died, and that such death was caused by reason of the injuries aforesaid.

That defendant denies each allegation of the complaint and alleges that any injury received by the deceased was due to his own negligence.

411 The principal questions in controversy are: 1st, whether on or about the said 20th day of March, 1902, the deceased was a passenger on one of the cars of the defendant company, and while riding as such, the defendant, through its employee, the motor-man in charge of the car, carelessly, negligently and unskillfully caused said car to be run into and upon a curve in its track at the corner of Adams and Sherman Streets, by reason whereof the deceased, without fault or negligence on his part, was thrown from the car and injured. 2nd, whether from these injuries thus received, if you so find them to have been received, death ensued as the proximate result of such injuries.

The plaintiff contends that the defendant, through its motor-man, did so negligently, carelessly and unskillfully operate and run its

car over and around said curve as to cause the deceased to be violently thrown to the ground and injured, while he, the deceased, was without fault which contributed to the accident and injury to him. The defendant contends to the contrary thereof.

The particulars in which it is claimed that the defendant's servant was negligent, careless, and unskillful are, first, that the car was run into the curve at a high and dangerous rate of speed, which in view of the curve at the corner of Adams and Sherman Streets which the car had to round was as a matter of fact dangerous and negligent; and second, that by reason of the negligence and
412 want of proper care on his part, the motor-man had not the proper charge or control of the car at the time it took the curve to allow it to pass in safety, but was negligently and carelessly diverting his attention from the operating and handling of the car to the search for a piece of money that had fallen upon the floor, by reason of which negligence and want of proper care he had not the proper control of the car when the accident occurred.

I charge you further that it was the duty of the motor-man in charge of the car, on nearing the curve in question, to be at his post of duty and to have his car under such control as would allow the car to pass upon and around the curve in safety, and for any failure on his part to so discharge his duty by reason of which a passenger on the car in the exercise of due care,—that care which an ordinarily prudent person would exercise in like circumstances, is injured, the defendant is liable and must respond to a person injured for the damages sustained.

I charge you as a matter of law that the acts of a servant of a corporation, of the motor-man in the case under consideration, within the scope of his employment, are in legal effect the acts of the corporation, and for the negligence of the servant the principal, the defendant, is liable, provided that the deceased had not, by some act or misconduct contributed to his own injury.

To constitute negligence on the part of the deceased contributing to his injury and death, there must have been a failure on
413 his part to observe and exercise ordinary care, that care which a man of ordinary prudence would have exercised, and if it appears that the deceased did use such care as men of ordinary prudence would have exercised in like circumstances, sitting where he was, then he was not guilty of contributory negligence which contributed to his injury and death.

In order to entitle the plaintiff to recover in this action it must appear by a fair preponderance of the evidence that the defendant was, on the occasion in question, negligent in the respects claimed by the plaintiff, and that such negligence was the proximate cause of the injury from which death ensued.

Now the term "proximate cause" in the sense in which it is ordinarily used, and in the sense in which it is used in these instructions, means the efficient cause which, in its natural effects, a sequence unbroken by any new, independent cause, would produce the event, and without which the event would not have occurred; there must be no

new, intermediate or independent cause, such negligence then becomes remote and not proximate.

I charge you further that a common carrier of passengers by electric street railway is bound to the highest degree of care and diligence which is reasonably practicable, all the circumstances considered, and in the running of its cars is bound to so operate control and run them with that degree of human foresight which
414 can be reasonably employed to prevent accidents to passengers: and, it is answerable for any injury or damage of which such neglect is the proximate cause, provided that the person injured has himself been using reasonable care and caution to avoid injury.

The degree of care required of the defendant in running its cars into and over a curve in its track, such as the one in question, is such care as is commensurate with the risk to those liable to be injuriously affected by want of it; and in determining what care was requisite to be exercised by the defendant in this case, the jury have a right to and should take into consideration that the defendant had provided the car in question with lateral seats on the outside of the enclosed part of the car on which passengers were invited to sit and ride, and where the deceased was rightfully riding when the car was rounding the curve, and the motor-man to know where the curves in the track were and to slow down to a reasonably safe speed when so entering a curve,—the rule of law being that the defendant was bound to use such care and prudence in running its car as was commensurate with the risk, in view of the entire situation, and of the interests likely to be affected by want of proper care.

Then it follows that if the injury to the deceased was caused through the negligence of the defendant, by its motor-man then in charge of the car, and the deceased himself was not guilty of
415 negligence which contributed to his injuries, and further find that the death of the deceased was the proximate result of such injury, the plaintiff is entitled to recover in this action. Provided you further find as a result of this negligence the death of the deceased resulted as a proximate cause of such negligence.

If, from the evidence given in the case, and the instructions I have given, you find for the plaintiff, then you will award such damages as you may deem fair and just, such as will fairly compensate the estate of the deceased for the loss sustained by reason of the death of the deceased, not exceeding, however, the sum of Five Thousand Dollars.

In determining the amount of damages to be awarded, if you find for the plaintiff, the jury may take into consideration the income and earning capacity of the deceased, his business capacity, experience and habits, his health, physical condition, energy and perseverance during what would probably have been his lifetime if he had not received the injuries from which death ensued. That is to say, the probable duration of the life of the deceased, considering his age, it has to be considered in this behalf.

I further charge you as a matter of law that the expectation of life for a man of sixty-two years of age, as laid down by the American

Experience Table of Mortality, and this is founded upon experience of years, is 12.86 years.

I charge you, however, that it is not necessary on the
416 part of the plaintiff to show the precise money value of the life of the deceased or the exact amount of damages suffered by the beneficiaries in order to sustain a recovery for substantial damages. However the suit restricts the finding in any such case not only to Five Thousand Dollars but to such damages as, under the proof in the case, shall be deemed by the jury to be fair and just.

It is contended by the defendant that prior to the accident in question the deceased had some chronic disease of the heart. Even if you should find that he did have some disease of the heart prior to the accident, yet if you should find that the injuries received in the accident were caused by the negligence and carelessness of the defendant and without fault on the part of the deceased, as before defined, and that such injuries so received in the accident were the proximate cause of the death of the deceased, then I charge you that the defendant is liable and must respond in damages such as the estate has suffered, all of the circumstances considered, by reason of the death of the deceased.

The Court instructs you that if you believe from the testimony in this case that if the deceased, George W. Sanders, would have died from endocarditis, as an independent cause, even if he had not received the injuries complained of, then you must find for the defendant.

You are instructed that before the plaintiff can recover
417 in this action he must satisfy you by a fair preponderance of all of the evidence that the injuries claimed to have been sustained by George W. Sanders, deceased, were caused by the negligence of the defendant, and that such injuries caused his death, and that, except as a result of such injuries, George W. Sanders probably would not have died.

You are instructed that if you believe from a fair preponderance of the evidence that the plaintiff's intestate, George W. Sanders, was injured through the negligence of the defendant and that such injury aggravated a disease from which he was suffering so that death resulted on that account, plaintiff is entitled to recover, but he is not entitled to recover if you find that Sanders would have died from the disease as an independent cause had he not received the injury.

The burden is upon the plaintiff in this case to show by a preponderance of the evidence that the death of the plaintiff was the direct and proximate result of the injuries sustained in the street car accident on March 20th, 1902, and that but for such injuries death would not have resulted.

The Court instructs you that by a preponderance of the evidence is not meant the greater number of witnesses, but rather the greater weight of credible testimony as determined by the character
418 of the testimony of the various witnesses and the respective means and opportunities such witnesses may have had of acquiring information and knowledge and of seeing or knowing and remembering that to which they testify, the probability of its truth.

their interest, if any, whether as parties or witnesses, in the result of the action and also their manner of testifying and every other fact which will enable you to determine the weight and credibility to be given to their testimony.

The jury is instructed that if it finds upon the consideration of the testimony of any witness that he has wilfully testified falsely as to any material fact, then you are at liberty to disregard the whole of his testimony.

Now I charge you further that under the law this is not a case which requires unanimity on the part of the jury. Our statutes provide that in a civil case not cognizable at common law that the verdict may be returned by three fourths of the jury. An action of this sort is not an action cognizable at common law, and therefore, a verdict may be found by three-fourths or more of the jury. Therefore, in the event that nine or more of you agree upon a verdict and all of you do not agree, those of you who do agree to the verdict will sign the same individually and then return it into court as you would return any other verdict, by your foreman. However, if twelve of you do agree, then you will return the verdict as in any other case, that is by your foreman returning the same into court in the presence of the jury.

419 If your verdict be for the plaintiff in this case, the form of the verdict will be, we, the jury find the issues in favor of the plaintiff and assess his damages at the amount he is entitled to recover.

If your verdict be for the defendant, the form of the verdict will be, we, the jury, find the issues in favor of the defendant.

The undersigned, Official Court Reporter of the District Court of the Fourth Judicial District of the Territory of Arizona, hereby certifies that the foregoing and hereto attached 197 pages constitute a full, true and correct transcript of his shorthand notes taken upon the trial of the cause of Lee H. Landis, Administrator of the Estate of George W. Sanders, deceased, vs. Phœnix Railway Company, tried at Prescott, Arizona, May 22nd, 23rd, 25th, and 26th, 1908, which said shorthand notes so taken were full, true and correct of all the oral testimony offered in evidence, —save and except the depositions which were read, and as to those the objections of counsel and the rulings of the Court thereon are noted,—as well as the objections of counsel, the rulings and remarks of the Court, to the best of his skill and ability.

W. S. NORVIEL,
Official Reporter.

E. & O. E.

Dated at Prescott, January 6th, 1909.

Filed at 10 o'clock A. M. Jan. 12, 1909. J. M. Watts, Clerk

420 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

No. 4610.

LEE H. LANDIS, Administrator, etc., Plaintiff,
vs.
PHOENIX RAILWAY COMPANY, a Corporation, Defendant.

Judge's Certificate of Transcript.

I, Richard E. Sloan, Judge of the above court before whom the foregoing cause was tried, do hereby certify that I have examined the foregoing transcript, which was submitted to me for approval under Sub. 4, Section 15, Chap. 73, Laws 1907, on Feb. 6, 1909, and find that such transcript should be and is hereby amended so as to show:

First. That upon the trial of said action, upon objection of defendant, the court excluded from a portion of the answer to direct interrogatory number eleven (No. 11), contained in the deposition of Frank De Massey, the language following:

"Between the 10th and 15th of July, 1902, Mr. Sanders' condition not improving, but getting worse, he decided to try California for relief."

Second. That upon the trial of said action, upon objection of defendant, the court excluded from the answer to direct interrogatory number eleven (No. 11), contained in the deposition of E. I.
421 Gibson, the last sentence of such answer, reading as follows:

"As to the cause I only know that he always said he had no breath and had no use of himself since he was thrown from the street-car."

And I further certify that the transcript is not defective in the other particulars suggested in the amendments filed by plaintiff and that, as hereby amended, such transcript contains a correct statement of all the evidence offered and received upon the trial of said cause, together with the rulings of the court upon the objections of counsel for the respective parties; and

It is hereby ordered that the foregoing transcript amended in the particulars hereinbefore set forth, be filed as of this date, and that it be made a part of the record on appeal in the above case.

Done at Prescott, Arizona, this 15th day of February, A. D., 1909.

RICHARD E. SLOAN, *Judge.*

Filed at 11 o'clock A. M. Feb. 15, 1909. J. M. Watts, Clerk.

(Filed in the District Court Jan. 12, 1909.)

422 And on the same day, to-wit: the sixteenth day of March, 1909, came the appellant herein by its attorneys, and filed in the clerk's office of said court, in said entitled cause, its certain

Abstract of Record, of which the following is an excerpt, the remaining portions of said Abstract of Record being omitted herefrom by direction of attorneys for appellant and plaintiff in error:

Title of Court and Cause.

(Excerpt from Deposition of Dr. O. E. Plath.)

* * * * * * * *

Thereupon the Court admitted in evidence over the objections of counsel for the defendant interrogatories eleven and twelve contained in the deposition of witness O. E. Plath and the answer of the witness thereto (76 and 158) and to the ruling of the court admitting such interrogatories and the answer thereto defendant duly excepted (19 and 160), the interrogatories and answers forming the basis of such objections being as follows:

"Doctor, assuming that the body identified as that of
123 George W. Sanders, deceased, on which this post mortem examination was held, was a man of 60 years of age, strong and healthy for a man of his years, whose duties at the Vulture Mine sixteen miles from Wickenburg, for several years immediately preceding an accident and injury later stated, require of him besides directing and overlooking the manual labor, the keeping of the books and lifting of pans and settling basins about the cyanide plant, going about all over the mines and buildings, down in the mines, through inclines to a depth of 450 feet, the climbing 200 feet and more perpendicular ladders, through tunnels and levels over ore piles, while superintending the work; takes part in timbering and all kinds of carpenter work about the mine, fires the engine, sharpens tools and shoes the horses and does other blacksmithing required about the mines; goes back and forth from Wickenburg with loaded team and discharges the load; carries water in five gallon pails 500 feet for domestic purposes, and windlasses ore from shafts;—a man who for many years prior to and up to the 20th of March, 1902, had engaged in manual labor of various kinds and all of which labor and duties he performed without apparent fatigue, his weight about 200 lbs.

"While riding upon the front lateral seat of the open part of an electric street car in Phoenix, beside a man traveling with him on the same seat, on the 20th day of March, 1902, the car enters a curve in the track where it enters another street while running ten miles or more per hour, the two men are thrown into the air and
124 come to the ground in a mix-up 15 feet from the car, the deceased, falling upon his back and the other man falling upon his; as soon as able to speak he complains of injury of the hip and chest; the same night he spat blood; the next day he was black and blue over the chest and hip, suffering continuous pain and expressed fear of internal injury. The next day, 22nd, accompanied by the man who was thrown with him, he returned to Wickenburg, thence by team to the Vulture Mine. His left arm is lame, breast over the heart is bruised and discolored which continued long after discoloration from bruises on other parts of his

body had disappeared; he complains of internal pain at the waist line at the side of the navel; has heart palpitation, spat blood and vomited clots of blood; the next day, 23rd of March, he drives to Wickenburg in the afternoon and next afternoon returned to camp where he required assistance to help him from the conveyance to the house and immediately takes to his bed; is suffering from pain about his heart, at the waist line and shoulder, and from suffocation; was confined to his bed for two weeks and on getting up and out it is discovered that physical exertion brings on heart palpitation, choking, suffocation and if persisted in produces vomiting.

"During the month of April following the accident he went into the mine and not returning as soon as expected a man is sent who finds him leaning against the wall of a- incline tunnel, exhausted and helpless and with the assistance of another the two brought him out and to the house, after which he was not permitted to go alone. He can no longer perform labor as before because of exer-
425 tion producing palpitation of the heart, choking, and suffocation; the bed chamber of himself and wife is changed to downstairs because the climbing of the stairs produces palpitation; his sleep when lying down is often interrupted by choking and suffocation and is relieved only by his wife, at times others assisting her, raising him to a sitting position; the driving of a team from the camp to Wickenburg, or back, so exhausts him at times that he is required to go to bed for hours and requires the administration of restoratives before he can get about again.

"The patient grows worse as time passes, the character of his symptoms and suffering being the same but more aggravated and is produced with less exertion as time passes. For some time strychnine and other drugs seem to control the heart action so the patient can do things not requiring much exertion, but drugs finally fail to have the effect of quieting the palpitation; he gradually grows worse until December, 1903, his limbs and feet begin to swell and continue to swell and grow worse until his death on the 6th day of February, 1904, the palpitation, suffocation, choking and vomiting coming on soon after the accident and continued down to his death, becoming more violent and frequent as time passes until the end; he was 62 years of age when he died.

"These facts assumed, Doctor, what, in your opinion, was the probably originating cause of death? And in giving your answer please disregard the anatomical conditions disclosed by the post mortem examination."

A. "I attribute the originating cause of death to the in-
426 jury of the heart received in the street railway accident."

* * * * * * *

(Excerpt from Deposition of Dr. E. Payne Palmer.)

* * * * * * *

Thereupon the Court admitted in evidence over the objections of counsel for the defendant interrogatories eleven and twelve contained in the deposition of witness Dr. E. Payne Palmer and the answers of the witness thereto (80 and 161) and to the ruling of

the Court admitting such interrogatories and the answers thereto defendant duly excepted (19 and 161), being the same interrogatories as those propounded to Dr. O. E. Plath with substantially the same answers.

427 And on to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. L. H. Chalmers, attorney for appellant, it is ordered by the Court that oral argument be granted in this cause, and the hearing set for January 11th, 1910.

And on to-wit: the eleventh day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. J. M. Ross, attorney for appellee herein, it is ordered by the Court that he be granted leave to add additional authority to appellee's brief.

And on the same day to-wit: the eleventh day of January 1910, being one of the regular juridical days of the January term
428 of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing was argued by Mr. L. H. Chalmers for appellant, and Mr. J. M. Ross and Mr. J. M. Jamison for appellee, and cause ordered submitted.

And on to-wit: the second day of April, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

429 In the Supreme Court of the Territory of Arizona.

No. 1114.

PHOENIX RAILWAY COMPANY, a Corporation, Appellant,
versus
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Appellee.

Appeal from the District Court of Yavapai County.

Before Honorable Richard E. Sloan, Judge.

Messrs. Chalmers & Wilkinson and Paul Burks, for Appellant.
Mr. J. H. Jamison, for Appellee.
Messrs. Norris & Ross, of Counsel.

Opinion by Campbell, J.

Appellee, as administrator of the estate of George W. Sanders, recovered a judgment of five thousand dollars against appellant, as damages resulting to the estate of Sanders, from his death, alleged to have been caused by the negligence of appellant.

The first assignment of error challenges the sufficiency of the complaint, inasmuch as it "failed wholly to show that any one beneficially interested in the estate of George W. Sanders had been pecuniarily damaged by reason of the alleged death of the deceased". This contention of appellant has been disposed of by us in
430 Southern Pacific Company v. Wilson, 10 Ariz., 162; 85 Pac., 401; and again in De Amado v. Friedman (Ariz.), 89 Pac., 588; and we see no reason, in the light of appellant's discussion, to recede from the views we have heretofore expressed.

The second and third assignments of error are directed to the trial court's ruling in permitting certain hypothetical questions to be answered by physicians. The abstract of record sets forth the questions in full. They are lengthy and purport to recite facts in evidence upon which the opinions of the witnesses are sought. The record merely recites that the answers were received in evidence "over the objections of counsel for the defendant", without in any wise disclosing the grounds, if any there were, upon which the objections were based. We must assume from this record that the objections were general ones. General objections to such questions are wholly unavailing. Rush v. French, 1 Ariz., 99; 25 Pac., 816. Counsel on either side, in their briefs, differ as to the form of the objections as actually made, and invite us to scrutinize several pages of the reporter's transcript. This we must decline to do. Our rules provide: "The abstracts of record, as filed, will be treated by the court as containing such portions of the record as the parties deem sufficient upon which to try the assignments of error." Sub. VI, Rule I, 8 Ariz., iv; 71 Pac., vi. We have so frequently commented upon the necessity of compliance with the requirements of

our rules in this respect that there would seem to be no excuse
431 for failure to do so.

Liberty Mining and Smelting Co. v. Geddes, (Ariz.), 90 Pac., 332.

Donohoe v. El Paso and S. W. R. R. Co., (Ariz.), 94 Pac., 1090.

Title Guaranty and Surety Co. v. Nichols, (Ariz.), 100 Pac., 825.

However, should we assume that counsel for appellant in their briefs have correctly set forth the grounds of the objections as made to the trial court, we perceive no error in the rulings complained of. Appellant contends that the instructions of the court are contradictory and misleading. The court clearly instructed the jury that should they find for the plaintiff they should award such damages as would fairly compensate the estate of the deceased for the loss sustained by reason of his death. Thereafter, in another instruction, the court said to the jury: "I charge you, however, that it is not necessary on the part of the plaintiff to show the precise money value of the life of the deceased or the exact amount of damages suffered by the beneficiaries, in order to sustain a recovery for substantial damages". In the succeeding instruction, the jury were again told that the damages to be allowed were such "as the estate has suffered, all of the circumstances considered, by reason of the death of the deceased." Appellant contends that these instructions are conflicting and contradictory; that they gave the jury to understand that such damages as the estate suffered might be awarded, and also such as those dependent upon the de-
432 ceased had suffered.

The term "beneficiary" does not appear to be recognized by lexicographers as having the precise meaning which is usually giving it when employed in actions to recover damages for death by wrongful act. It seems to have come into use as a legal term following the suggestion of Judge Story, in his work on Equity Jurisprudence, that "to escape from the awkwardness of a barbarous foreign idiom" the person beneficially interested in a trust should be called the beneficiary, rather than the cestui que trust. Sec. 321, Story's Equity Jurisprudence. It has been so defined by statute in some states. 1 Words and Phrases, 750. It is also used to designate a person to whom a policy of insurance is payable. In an action to recover damages for death by wrongful act, where the damages to be recovered by a representative are those suffered by certain individuals indicated in the statute giving the right of action, those for whose benefit the recovery is sought are usually designated as beneficiaries. It is not wholly inapt to refer to the estate as the beneficiary, where, as in this Territory, the damages to be recovered by an administrator are such as the estate has suffered. But conceding, as we do, that the term "beneficiaries" as here used is technically inappropriate, it does not follow that the verdict should be set aside. Instructions to juries must be so framed as

clearly to define the law and must not be contradictory; but
433 the error involved in the use of an inappropriate word, where it does not serve to confuse or mislead the jury, is harmless. This action was tried throughout upon the theory that the damages to be awarded, if any, were such as were suffered by the estate of the deceased. There was no testimony concerning the existence of any one dependent upon Sanders, nor that any one had suffered pecuniary injury by reason of his death. The jury were plainly instructed, just prior to the giving of the instruction complained of, that the damages to be awarded were those suffered by the estate, and in the instruction next following were again so charged. We are unable to perceive that the term complained of, in the connection in which it was employed and under the circumstances appearing from the record, could have confused or misled the jury.

Appellant insists that the verdict is excessive. The deceased was sixty-two years of age at the time of his death. He was by profession a mining engineer, and there was testimony tending to show that prior to receiving the injuries which resulted in his death he was in robust health; that he was, and for some time had been in the employment of a mining company, at a salary of one hundred dollars per month, and in addition was furnished a house and provisions for himself and wife. His life expectancy is shown to have been 12.86 years. Under this testimony, we cannot say that the verdict is excessive.

434 The remaining assignments of error are without merit, and do not require discussion.

We find no reversible error in the record, and therefore affirm the judgment of the district court.

JOHN H. CAMPBELL, A. J.

We concur:

FLETCHER M. DOAN, A. J.
ERNEST W. LEWIS, A. J.
EDWARD M. DOE, A. J.

Kent, C. J., took no part in the determination of this case.

And on to-wit: the second day of April, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the district court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the ap-
435 pellee herein do have and recover of and from the Phoenix Railway Company, a corporation, appellant herein, and The United States Fidelity and Trust Company, a corporation, surety

on Supersedeas Bond herein, the sum of Five Thousand ($5,000.) Dollars, together with his costs in this court, taxed at — Dollars, and his costs in the court below in this cause incurred.

And on to-wit: the sixteenth day of April, 1910, comes the appellant by its attorneys and files in the clerk's office of said court in said entitled cause its certain Motion for Rehearing in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1114.

PHOENIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Appellee.

Application for Rehearing.

Comes now the Phoenix Railway Company, appellant in the above entitled action, and respectfully petitions the Court for a rehearing of said cause in which judgment was rendered on the Second day of April 1910, basing its petition on the following grounds:

436-454 I.

That the Court overlooked and did not consider appellant's assignments of error Nos. 7 and 8, and particularly that portion of appellant's assignment of errors No. 7 reading as follows:

"That there was no evidence introduced on the trial of said cause showing that either the plaintiff or the estate of the deceased had been damaged in the sum of Five Thousand Dollars, or in any other sum or at all."

II.

That the Court overlooked and did not consider appellant's assignment of error No. 5.

III.

That the Court in passing upon appellant's assignment of errors No. 4, and in deciding that the error of the trial judge in giving instruction No. 13 to the jury could not have been prejudicial to appellant, overlooked the fact that there was evidence before the jury authorizing a substantial recovery for the benefit of the widow and family of the deceased.

* * * * * * *

455 And on to-wit: the twentieth day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellant, be submitted.

And on to-wit: the twenty-first day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellant, and heretofore submitted, be and the same is hereby, granted, and the cause set for hearing November 10th, 1910.

And on to-wit: the tenth day of November, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in
456 said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. L. H. Chalmers, attorney for appellant herein, it is ordered that he be granted a few days' time within which to file a reply brief to appellee's brief on rehearing.

And on the same day to-wit: the tenth day of November, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for re-hearing was argued by Mr. L. H. Chalmers for appellant and Mr. J. M. Ross for appellee, and cause ordered submitted.

And on to-wit: the sixteenth day of January, 1911, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

457 In the Supreme Court of the Territory of Arizona.

PHOENIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Appellee.

On Re-hearing.

Per Curiam: In our former opinion in this case (108 Pac. 247), we affirmed the judgment of the lower Court, but subsequently granted a re-hearing in order that we might further consider whether the lower Court committed error in giving an instruction upon the measure of damages which charged the jury, that in determining the measure of damages they should take into consideration the habits of deceased, but failed to specify particularly what habits they were authorized to so consider.

If appellant desired that the Court instruct with greater particularity as to what habits should be considered, it should have presented to the Court, and requested the giving of instructions fully covering the subject in accordance with its view of the law; having failed so to do, it is not now entitled to complain of the omission.

This, we think, is the generally accepted view.

458 Backus vs. Fort Street Union Depot, 169 U. S. 557.
Kansas City So. Ry. Co. vs. Henderson (Ark.), 112 S. W. 967.
Galveston Oil Co. vs. Malin, 60 Tex. 645.
Sharon vs. Winnebago Furniture Mfg. Co. (Wis.), 124 N. W. 299.
Warren etc. R. Co. vs. Waldorp (Ark.) 123 S. W. 792.
Greenway vs. Taylor Co. (Ia.), 122 N. W. 493-497.

No prejudicial error appearing, the judgment of the lower Court is affirmed.

FLETCHER M. DOAN, *A. J.*
JOHN H. CAMPBELL, *A. J.*
ERNEST W. LEWIS, *A. J.*
EDWARD M. DOE, *A. J.*

The Chief Justice, being disqualified, took no part in the determination of this cause.

And on the same day to-wit: the sixteenth day of January, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered
459 the same and being fully advised in the premises:

It is ordered that the judgment of the lower court be, and the same is hereby affirmed.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from the Phoenix Railway Company, a corporation, appellant herein, and The United States Fidelity and Guaranty Company, a corporation, surety on Supersedeas Bond herein, the sum of Five Thousand ($5,000.00) Dollars, together with his costs in this court, taxed at forty-two ($42.00) dollars, and his costs in the court below in this case incurred.

And on to-wit: the seventeenth day of January, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day comes L. H. Chalmers, Esq., attorney for appellant herein, and gives notice in open court of his intention to apply for a Writ of Error from the Supreme Court of the United States from the judgment rendered against them in this Court, and

Upon motion of L. H. Chalmers, Esq., it is ordered that the amount of the Supersedeas Bond be fixed in the sum of
460 Eleven Thousand ($11,000.00) Dollars, and the Mandate stayed for thirty days.

And on to-wit: the sixteenth day of February, 1911, comes the appellant by its attorneys and files in the clerk's office of said court in said entitled cause, its certain Petition for Writ of Error and Allowance thereof, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

PHOENIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Appellee.

Petition for Writ of Error.

Comes now the above named appellant, the Phoenix Railway Company, a corporation, and respectfully represents that the above entitled Court did on the second day of April, 1910, affirm the judgment of the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, in favor of the above named appellee, Lee H. Landis, as against the above named

defendant and appellant, Phoenix Railway Company, and
161 that the above Court did also on the 21st day of May, 1910, grant a rehearing in said cause and did further, on the 16th day of January, 1911, on rehearing, affirm judgment in favor of the said appellee and against the said appellant and defendant. That the said judgments of affirmance made and entered by the above Court as aforesaid are final decisions;

Now, therefore, the said Phoenix Railway Company, a Corporation, the appellant above named, feeling itself aggrieved by the aforesaid final judgments rendered against it in the above entitled cause does hereby pray a writ of error from said decision and judgment to the Supreme Court of the United States upon the error assigned in the assignment of errors submitted herewith.

CHALMERS & WILKINSON,
Attorneys for Appellant.

The writ of error hereinabove prayed for is hereby allowed upon the filing with the Clerk of this Court by the appellant above named, the Phoenix Railway Company, of a bond in favor of the above named appellee, Lee H. Landis, in the sum of eleven thousand dollars, and said bond, when approved, shall act as a supersedeas of the judgment in the above entitled action.

Dated this 16th day of February, 1911.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

162 And on the same day to-wit: the sixteenth day of February, 1911, comes the appellant by its attorneys and files in the clerk's office of said court in said entitled cause, its certain Assignment of Errors and Prayer for Reversal, in words and figures following, to-wit:

In the Supreme Court of the United States.

PHOENIX RAILWAY COMPANY, a Corporation (Defendant and Appellant Below), Plaintiff in Error.

vs.

LEE H. LANDIS, Administrator of the Estate of George W. Saunders, Deceased (Plaintiff and Appellee Below), Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Comes now the Phoenix Railway Company, plaintiff in error in the above entitled cause, and respectfully submits that in the record proceedings decision and final judgment of the Supreme Court of the Territory of Arizona in the cause entitled Phoenix Railway Company, a corporation, appellant, vs. Lee H. Landis, Administrator of the Estate of George W. Saunders deceased, appellee, in which final Judg. was rendered on the 2nd day of April, 1910, and a rehearing

was granted on the 21st day of May, 1910, and the former judgment was affirmed on rehearing on the 16th day of January, 1911, the said Phoenix Railway Company having obtained a writ of error upon said judgment of said Supreme Court of the Territory
463 of Arizona, returnable within sixty days after the date of said writ of error to the Supreme Court of the United States at Washington, in the District of Columbia, assignes for error in the records and judgment aforesaid the following, to-wit:

I.

That said Supreme Court of Arizona erred in holding and deciding that in an action for death caused by wrongful act brought by the administrator of the deceased under Title 35 (page 733) of the Revised Statutes of Arizona of 1901, the complaint need not allege and the plaintiff need not prove the existence of beneficiaries who have sustained damages from the death of the deceased.

II.

That the said Supreme Court of Arizona erred in holding and deciding that the error of the trial court in giving to the jury the two inconsistent instructions numbered 11 and 13 was not prejudicial to plaintiff in error. The said two instructions reading respectively as follows:

Number 11.

"If, from the evidence given in the case and the instructions I have given you, you find for the plaintiff, then you will award such damages as you may deem fair and just, such as will fairly compensate the estate of the deceased for the loss sustained by reason of the death of the deceased, not exceeding, however, the sum of Five Thousand Dollars."

464

Number 13.

"I charge you, however, that it is not necessary on the part of the plaintiff to show the precise money value of the life of the deceased or the exact amount of damages suffered by the beneficiaries in order to sustain a recovery for substantial damages. However, you must restrict the findings in any case not only to Five Thousand Dollars but to such damages as under the proof in the case shall be deemed by the jury to be fair and just."

III.

That the said Supreme Court of Arizona erred in holding and deciding that the error of the trial court in giving instruction number 13 to the jury was not prejudicial to plaintiff in error. Said instruction reading as set forth in assignment of error number 2 above.

IV.

That the said Supreme Court of Arizona erred in holding and deciding that plaintiff was entitled to recover substantial damages for the benefit of the estate of the deceased without evidence showing or tending to show that deceased had ever saved or would have saved any portion of his earnings.

V.

That the said Supreme Court of Arizona erred in holding and deciding that plaintiff in error was barred of his right to complain of the error of the trial court in giving instruction number
465 12 to the jury by his failure to ask an instruction on the measure of damages at the trial. The said instruction number 12 reading as follows:

"In determining the amount of damages to be awarded if you find for the plaintiff the jury may take into consideration the income and earning capacity of the deceased, his business capacity, experience and habits, his health, physical condition, energy and perseverance during what would probably have been his lifetime had he not received the injury from which death ensued. That is to say, the probable duration of the life of the deceased considering his age, has to be considered in this behalf."

"I further charge you as a matter of law that the expectation of life of a man 62 years of age, as laid down by the American Experience Table of Mortality, and this is founded upon experience of years, is 12.86 years."

VI.

That the said Supreme Court of Arizona erred in holding and deciding that since the abstracts of record filed in said Court in compliance with Court Rule No. 1 of said Court merely stated that the answers to the hypothetical questions put to Doctors O. E. Plath and E. Payne Palmer were admitted in evidence over the objection of the defendant and that the ruling was duly excepted to by defendant it must be presumed by the said Supreme Court of Arizona that the objection made to said hypothetical questions were gen-
466 eral objections and insufficient to preserve the defendant's right to object to said questions on appeal, notwithstanding the fact that the reporter's transcript filed with the Clerk of said Supreme Court of Arizona and expressly made a part of the record of the cause by Chapter 74, page 122 of the Session Laws of the Twenty-fourth Legislative Assembly of Arizona (Laws of 1907, page 125) clearly showed that defendant's attorney in making said objection clearly pointed out the precise grounds of the objection, and notwithstanding the further fact that the abstract of record specifically referred to the page of the reporter's transcript where the precise grounds of the objection were set forth.

VII.

That the said Supreme Court of Arizona erred in holding and deciding that the trial court did not commit error in overruling defendant's (Plaintiff in error's) objection to the hypothetical question contained in Interrogatory No. 11 put to Dr. O. E. Plath. The said hypothetical question reading as follows:

"Doctor, assuming that the body identified as that of George W. Sanders, deceased, on which this post mortem examination was held, was a man of 60 years of age, strong and healthy for a man of his years, whose duties at the Vulture Mine sixteen miles from Wickenburg, for several years immediately preceding an ac-
467 cident and injury later stated, require of him besides directing and overlooking the manual labor, the keeping of the books and lifting of pans and settling basins about the cyanide plant, going about all over the mines and buildings, down in the mines, through inclines to a depth of 450 feet, the climbing 200 feet and more perpendicular ladders, through tunnels and levels over ore piles, while superintending the work; takes part in timbering and all kinds of carpenter work about the mine, fires the engine, sharpens tools and shoes the horses and does other blacksmithing required about the mines; goes back and forth from Wickenburg with loaded teams and discharges the load; carries water in five gallon pails 500 feet for domestic purposes, and windlasses ore from shafts; — a man who for many years prior to and up to the 20th of March, 1902, had engaged in manual labor of various kinds and all of which labor and duties he performed without apparent fatigue, his weight about 200 pounds.

"While riding upon the front lateral seat of the open part of an electric street car in Phoenix, beside a man traveling with him on the same seat, on the 20th day of March, 1902, the car enters a curve in the track where it enters another street while running ten miles or more per hour, the two men are thrown into the air and come to the ground in a mix-up 15 feet from the car, the deceased falling upon his back and the other man falling upon his; as soon as able to speak he complains of injury of the hip and chest;
468 the same night he spat blood; the next day he was black and blue over the chest and hip, suffering continuous pain and expressed fear of internal injury. The next day, 22nd, accompanied by the man who was thrown with him, he returned to Wickenburg, thence by team to the Vulture Mine. His left arm is lame, breast over the heart is bruised and discolored which continued long after discoloration from bruises on other parts of his body had disappeared, he complains of internal pain at the waist line at the side of the navel; has heart palpitation, spat blood and vomited clots of blood; the next day, 23rd of March, he drives to Wickenburg in the afternoon and next afternoon returned to camp where he required assistance to help him from the conveyance to the house and immediately takes to his bed; is suffering from pain about his heart, at the waist line and shoulder, and from suffocation; was confined to his bed for two weeks and on getting up and out it is discovered that physical exertion brings on heart palpita-

tion, choking, suffocation and if persisted in produces vomiting.

"During the month of April following the accident he went into the mine and not returning as soon as expected a man is sent who finds him leaning against the wall of an incline tunnel, exhausted and helpless and with the assistance of another the two brought him out and to the house, after which he was not permitted to go alone. He can no longer perform labor as before because of exertion producing palpitation of the heart, choking and suffocation; the bed chamber of himself and wife is changed to downstairs because the climbing of the stairs produces palpitation; his sleep when lying down is often interrupted by choking and suffocation and is relieved only by his wife, at times others assisting her, raising him to a sitting position; the driving of a team from the camp to Wickenburg, or back, so exhausts him at times that he is required to go to bed for hours and requires the administration of restoratives before he can get about again.

"The patient grows worse as time passes, the character of his symptoms and suffering being the same but more aggravated and is produced with less exertion as time passes. For some time strychnine and other drugs seem to control the heart action so the patient can do things not requiring much exertion, but drugs finally fail to have the effect of quieting the palpitation; he gradually grows worse until December, 1903, his limbs and feet begin to swell and continue to swell and grow worse until his death on the 6th day of February, 1904, the palpitation, suffocation, choking and vomiting coming on soon after the accident and continued down to his death, becoming more violent and frequent as time passes until the end; he was 62 years of age when he died.

"These facts assumed, Doctor, what, in your opinion, was the probably originating cause of death? And in giving your answer please disregard the anatomical conditions disclosed by the post mortem examination."

The answer to said question reading as follows:

"I attribute the originating cause of death to the injury of the heart received in the street railway accident."

And the objection to said question and the answer thereto being made substantially as follows:

By Mr. BURKS (plaintiff in error's attorney): "Defendant desires to object to Interrogatory 11 propounded to witness O. E. Plath on the ground and for the reasons that the said interrogatory assumed conditions which have not been testified to; upon the further grounds that the question was incompetent, immaterial and irrelevant and that it calls for an answer upon matters of fact which are the very issues to be determined by the jury and which amounts in substance to asking of this witness what verdict should be returned by this jury."

And further by Mr. BURKS: "The question is whether death could have resulted from a blow on the head, not as to whether a particular blow on a particular man struck in a particular manner. Then it is improper because it calls for the exact question which the jury must pass upon. That is the difference in this hypothetical

question. If the question called for an opinion whether a particular result could have been obtained in a particular manner then it might be proper, but in this case we submit it is absolutely improper in that it really calls for an answer by the witness,
471 in his opinion, what verdict the jury should render in the case."

And further by Mr. BURKS: "Now the defendant objects to interrogatory number 11 propounded to Dr. Plath upon the ground that this hypothetical question assumes facts which were not in evidence and it is not based upon all the facts in evidence. In other words, it is based upon a wrongful hypothesis and calls for an opinion by the witness on matters of fact which should be determined by the jury and it amounts in substance to asking the witness to render the verdict which should be rendered by the jury in the case. It is based purely upon the evidence by the plaintiff and not all of that, and upon facts not introduced by the plaintiff. This question assumes that upon the return to Wickenburg on the 23rd the deceased took to his bed, which is not a fact. The evidence is that on the following day he drove Mr. McKee to Wickenburg. That on the 25th he returned, and the evidence is to the effect that two days later he went to Phoenix. Dr. Ward's testimony shows that he was in Phoenix on the 25th of March."

And further by Mr. BURKS: I think there has been no testimony introduced up to this time as to the physical condition of the deceased as outlined in the question. There is no medical testimony upon that point. There is no testimony to show deceased suffered from more severe palpitation than at first. There is no tes-
472 timony by any one competent to testify what the physical condition was. Furthermore, we think if that question is to be put at this time it should assume all the facts which are now before the jury."

By the COURT: "No, I will let the evidence go in."

By Mr. BURKS: "We object to the ruling of the Court and save an exception."

VIII.

That the said Supreme Court of Arizona erred in holding and deciding the trial court did not commit error in overruling defendant's objection to the hypothetical questions contained in Interrogatory No. 12 put to Dr. O. E. Plath and Interrogatory Nos. 11 and 12 put to Dr. E. Payne Palmer, the said questions and answers thereto being substantially the same as the question and answer set forth in assignment of error No. VII above, and substantially the same objection being made to the questions and to the answers thereto.

IX.

That the said Supreme Court of Arizona erred in holding and deciding that the verdict of the jury was not contrary to the instructions of the Court.

X.

Said Supreme Court of Arizona erred in holding and deciding that the trial court did not err in denying defendant's motion for a new trial.

173 Wherefore and on account of said manifest errors and each of them, all of which errors appear upon the records of said cause, and in the decisions and judgment of said Supreme Court of said Territory of Arizona, the said Phœnix Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of the Territory of Arizona in said cause may be reversed and that the said Supreme Court of the Territory of Arizona be ordered to enter an order sustaining plaintiff in error's exceptions and each of them, and remanding said cause to the District Court for further proceeding.

CHALMERS & WILKINSON,
Attorneys for Plaintiff in Error.

And on the same day to-wit: the sixteenth day of February, 1911, comes the appellant by its attorneys and files in the clerk's office of said court in said entitled cause, its certain Affidavit of Value in Dispute, in words and figures following, to-wit:

174 In the Supreme Court of the Territory of Arizona.

PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Appellee.

Affidavit of Value in Dispute.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Before the undersigned, a Notary Public in and for said County, personally appeared L. H. Chalmers, being by me duly sworn, and upon his oath says that he is one of the attorneys of record of the Phœnix Railway Company, appellant in said cause, and that the amount in controversy in said cause, exclusive of costs, exceeds Five Thousand Dollars.

L. H. CHALMERS.

Subscribed and sworn to before me this 15th day of February, 1911.

[SEAL.]

O. E. SCHUPP,
Notary Public.

My Commission expires April 26, 1911.

475 And on the same day to-wit: the sixteenth day of February, 1911, there was filed in the clerk's office of said court in said entitled cause a certain Bond in words and figures following, to-wit:

In the Supreme Court of the United States.

PHOENIX RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents: That we, Phoenix Railway Company, a corporation, as principal, and The United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Lee H. Landis, Administrator of the Estate of George W. Sanders, deceased, in the sum of $11,000.00, lawful money of the United States, to be paid to him or his executors, administrators or successors, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated this 16th day of February, 1911.

476 Whereas, in the suit entitled Lee H. Landis, Administrator of the Estate of George W. Sanders, deceased, plaintiff, vs. Phoenix Railway Company, a corporation, defendant, the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai, on the 26th day of May, 1908, entered judgment for $5000.00, together with interest and costs, against the said Phoenix Railway Company, and;

Whereas, said judgment was affirmed on the 2nd day of April, 1910, and was further affirmed on rehearing on the 16th day of January, 1911, by the Supreme Court of the Territory of Arizona and;

Whereas, the said Phoenix Railway Company has prosecuted a Writ of Error to the Supreme Court of the United States to reverse the said judgment;

Now, therefore, the conditions of this obligation are such that if the above named Phoenix Railway Company shall prosecute its said Writ of Error to effect and answer all damages and costs and shall pay the said judgments in full, together with interest, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

PHOENIX RAILWAY COMPANY,
By L. H. CHALMERS, *Attorney.*
THE UNITED STATES FIDELITY AND
[SEAL.] GUARANTY COMPANY,
By JOHN J. SWEENEY, *Attorney in Fact.*
And by R. C. STANFORD, *Attorney in Fact.*

Approved:
EDWARD KENT,
Chief Justice Supreme Court of Arizona.

177 UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record in a certain cause lately pending in said court, No. 1114, wherein the Phœnix Railway Company, a corporation was appellant, and Lee H. Landis, Administrator of the Estate of George W. Sanders, Deceased, was appellee, including the Judgment Roll, Depositions of Ed. S. Turner, Frank De Massey, Geo. E. Sanders, Dan McNeil, E. L. Gibson, Chas. L. Kinsley, Dr. R. S. Slusher, Joseph C. McKee, Dr. John W. Foss, Dr. O. E. Plath, Dr. E. Payne Palmer, W. T. Barr, and Dr. Wm. H. Ward, Objections to Depositions by Defendant, Plaintiff's Exhibits "A" and "B," Defendant's Exhibits "A" and "B," Reporter's Transcript of Evidence, Excerpt from Abstract of Record, Opinion, Judgment, Motion for Rehearing, Answer to Motion for Rehearing, Petition for Writ of Error, Assignment of Errors, Affidavits of Value, Bond, and all minute entries had and entered of record; as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Writ of Error, Citation, and Orders of Enlargement, are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 28th day of June, A. D., 1911, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court.

178 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the Territory of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Arizona, before you or some of you, between Phœnix Railway Company, a Corporation, plaintiff and appellant, and Lee H. Landis, Administrator of the Estate of George W. Sanders, deceased, defendant and appellee, a manifest error hath happened, to the great damage of the said plaintiff and appellant, Phœnix Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date

hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 16 day of Febv., in the year of our Lord One Thousand Nine Hundred and Eleven.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, Jr.,
Clerk of the Supreme Court of the Territory of Arizona.

Allowed by—
EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

1911.

179 [Endorsed:] No. 1111. In the Supreme Court of the United States. Phoenix Railway Company, a Corporation, Plaintiff & Appellant, vs. Lee H. Landis, Administrator of the Estate of George W. Sanders, deceased, Defendant & Appellee. Writ of error. Filed Feb. 16, 1911. F. A. Tritle, Jr., Clerk. Chalmers & Wilkinson, Attorneys for Plaintiff and Appellant.

180 In the Supreme Court of the United States.

PHOENIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Appellee.

UNITED STATES OF AMERICA, *ss:*

To Lee H. Landis, Administrator of the Estate of George W. Sanders, Deceased:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Arizona, wherein the Phoenix Railway Company, a corporation, is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgments rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 16th day of February in the year of Our Lord One Thousand Nine Hundred and Eleven.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

481 We hereby waive service of the above citation on us and consent that said citation, with this waiver, may be filed as complete service upon us in accordance with said citation.
February 16, 1911.

J. M. JAMISON,
Attorney of Record for Lee H. Landis, Administrator of the Estate of George W. Sanders, Deceased.

482 [Endorsed:] No. 1114. In the Supreme Court of the Territory of Arizona. Phoenix Railway Company, a Corporation, Appellant, vs. Lee H. Landis, Administrator of the Estate of George W. Sanders, Deceased, Appellee. Citation. Filed Feb. 16, 1911. F. A. Tritle, Jr., Clerk. Chalmers & Wilkinson, Attorneys for Appellant.

483 In the Supreme Court of the United States.

PHOENIX RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Defendant in Error.

Order Enlarging Time for Docketing and Filing Record in the Supreme Court of the United States.

The above named plaintiff in error having sued out a writ of error to the Supreme Court of the Territory of Arizona from the Judgment of the said Supreme Court of the Territory of Arizona, and good cause having been shown why the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States should be enlarged, it is hereby

Ordered that the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States, be and the same is hereby enlarged until and including the 11th day of June, 1911, and the return day of the citation heretofore filed and served upon such writ of error is hereby enlarged and extended until said last named day.
Dated April 15, 1911.

EDWARD KENT,
Chief Justice Supreme Court, Territory of Arizona.

484 [Endorsed:] No. 1114. In the Supreme Court of the United States. Phoenix Railway Company, a Corporation, Plaintiff in Error, vs. Lee H. Landis, Administrator of the Estate of George W. Sanders, deceased, Defendant in Error. Order Enlarging time for Docketing and Filing Record in the Supreme Court of the United States. Filed April 15, 1911. F. A. Tritle, Jr., Clerk.

485 In the Supreme Court of the United States.

PHOENIX RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders Deceased, Defendant in Error.

Order Enlarging Time for Docketing and Filing Record in the Supreme Court of the United States.

The above named plaintiff in error having sued out a writ of error to the Supreme Court of the Territory of Arizona from the judgment of the said Supreme Court of the Territory of Arizona, and good cause having been shown why the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States should be enlarged, it is hereby

Ordered that the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States, be and the same is hereby further enlarged until and including the tenth day of July, 1911, and the return day of the Citation heretofore filed and served upon such writ of error is hereby further enlarged and extended until said last named day.

Dated June 6th, 1911.

EDWARD KENT,
Chief Justice Supreme Court, Territory of Arizona.

486 [Endorsed:] No. 1114. In the Supreme Court of the United States. Phoenix Railway Company, a Corporation, Plaintiff in Error, vs. Lee H. Landis, Administrator of the Estate of George W. Sanders, deceased, Defendant in Error. Order further enlarging time for Docketing and Filing Record in the Supreme Court of the United States. Filed June 6, 1911. F. A. Tritle, Jr., Clerk.

487 In the Supreme Court of the United States.

No. —.

PHOENIX RAILWAY COMPANY, a Corporation, Paintiff in Error,
vs.
LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased, Defendant in Error.

Statement of Errors on Which Plaintiff in Error Intends to Rely and of the Parts of the Record Which Plaintiff in Error Designates to be Printed.

Comes now the Phoenix Railway Company, a corporation, plaintiff in error in the above entitled action, and under the provisions of paragraph 9 of Rule 10 of the Court Rules of the Supreme Court

of the United States files herein its statement of errors on which it intends to rely and of the parts of the record it thinks necessary for a consideration thereof and therefore designates to be printed, as follows, to-wit:

I.

Statement of the Errors on Which Plaintiff in Error Intends to Rely.

Plaintiff in error intends to rely upon all the errors heretofore assigned in the assignment of errors and prayer for reversal heretofore filed by plaintiff in error in this case, said errors being assigned in the said assignment of errors and prayer for reversal as follows, to-wit:

1.

That said Supreme Court of Arizona erred in holding and deciding that in an action for death caused by wrongful act brought by the administrator of the deceased under Title 35 (page 733) of the Revised Statutes of Arizona of 1901, the complaint need not
188 allege and the plaintiff need not prove the existence of beneficiaries who have sustained damages from the death of the deceased.

2.

That the said Supreme Court of Arizona erred in holding and deciding that the error of the trial court in giving to the jury the two inconsistent instructions numbered 11 and 13 was not prejudicial to plaintiff in error. The said two instructions reading respectively as follows:

Number 11.

"If, from the evidence given in the case and the instructions I have given you, you find for the plaintiff, then you will award such damages as you may deem fair and just, such as will fairly compensate the estate of the deceased for the loss sustained by reason of the death of the deceased, not exceeding, however, the sum of Five Thousand Dollars."

Number 13.

"I charge you, however, that it is not necessary on the part of the plaintiff to show the precise money value of the life of the deceased or the exact amount of damages suffered by the beneficiaries in order to sustain a recovery for substantial damages. However, you must restrict the findings in any case not only to Five Thousand Dollars but to such damages as under the proof in the case shall be deemed by the jury to be fair and just."

3.

That the said Supreme Court of Arizona erred in holding and deciding that the error of the trial court in giving instruction

number 13 to the jury was not prejudicial to plaintiff in error. Said instruction reading as set forth in assignment of error number 2 above.

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4.

That the said Supreme Court of Arizona erred in holding and deciding that plaintiff was entitled to recover substantial damages for the benefit of the estate of the deceased without evidence showing or tending to show that deceased had ever saved or would have saved any portion of his earnings.

5.

That the said Supreme Court of Arizona erred in holding and deciding that plaintiff in error was barred of his right to complain of the error of the trial court in giving instruction number 12 to the jury by his failure to ask an instruction on the measure of damages at the trial. The said instruction number 12 reading as follows:

"In determining the amount of damages to be awarded if you find for the plaintiff the jury may take into consideration the income and earning capacity of the deceased, his business capacity, experience and habits, his health, physical condition, energy and perseverance during what would probably have been his lifetime had he not received the injury from which death ensued. That is to say, the probable duration of the life of the deceased considering his age, has to be considered in this behalf."

"I further charge you as a matter of law that the expectation of life of a man 62 years of age, as laid down by the American Experience Table of Mortality, and this is founded upon experience of years, is 12.86 years."

6.

That the said Supreme Court of Arizona erred in holding and deciding that since the abstracts of record filed in said court in compliance with Court Rule No. 1 of said court merely stated
490 that the answers to the hypothetical questions put to Doctors O. E. Plath and E. Payne Palmer were admitted in evidence over the objection of the defendant and that the ruling was duly excepted to by defendant it must be presumed by the said Supreme Court of Arizona that the objections made to said hypothetical questions were general objections and insufficient to preserve the defendant's right to object to said questions on appeal, notwithstanding the fact that the reporter's transcript filed with the clerk of said Supreme Court of Arizona and expressly made a part of the record of the cause by Chapter 74, page 122 of the Session Laws of the Twenty-fourth Legislative Assembly of Arizona (Laws of 1907, page 125) clearly showed that defendant's attorney in making said objection clearly pointed out the precise grounds of the objection, and notwithstanding the further fact that the abstract of record specifically referred to the page of the reporter's transcript where the precise grounds of the objection were set forth.

7.

That the said Supreme Court of Arizona erred in holding and deciding that the trial court did not commit error in overruling defendant's (plaintiff in error's) objection to the hypothetical question contained in Interrogatory No. 11 put to Dr. O. E. Plath. The said hypothetical question reading as follows:

"Doctor, assuming that the body identified as that of George W. Sanders, deceased, on which this post mortem examination was held, was a man of 50 years of age, strong and healthy for a man of his years, whose duties at the Vulture Mine sixteen miles from Wickenburg, for several years immediately preceding an accident
191 and injury later stated, require of him besides directing and overlooking the manual labor, the keeping of the books and lifting of pans and settling basins about the cyanide plant, going about all over the mines and buildings, down in the mines, through inclines to a depth of 150 feet, the climbing 200 feet and more perpendicular ladders, through tunnels and levels over ore piles, while superintending the work; takes part in timbering and all kinds of carpenter work about the mine, fires the engines, sharpens tools and shoes the horses and does other blacksmithing required about the mines; goes back and forth from Wickenburg with loaded teams and discharges the load; carries water in five gallon pails 500 feet for domestic purposes, and windlasses ore from shafts;—a man who for many years prior to and up to the 20th of March, 1902, had engaged in manual labor of various kinds and all of which labor and duties he performed without apparent fatigue, his weight about 200 pounds.

"While riding upon the front lateral seat of the open part of an electric street car in Phoenix, beside a man traveling with him on the same seat, on the 20th day of March, 1902, the car enters a curve in the track where it enters another street while running ten miles or more per hour, the two men are thrown into the air and come to the ground in a mix-up 15 feet from the car, the deceased, falling upon his back and the other man falling upon him; as soon as able to speak he complained of injury of the hip and chest; the same night he spat blood; the next day he was black and blue over the chest and hip, suffering continuous pain and expressed fear of internal injury. The next day, 22nd, accompanied by the man who was thrown with him, he returned to Wickenburg, thence by team to the Vulture Mine. His left arm is lame, breast over the heart is bruised and discolored which continued long after discoloration from bruises on other parts of his body had disappeared; he com-
192 plains of internal pain at the waist line at the side of the navel; has heart palpitation, spat blood and vomited clots of blood; the next day, 23rd of March, he drives to Wickenburg in the afternoon and next afternoon returned to camp where he required assistance to help him from the conveyance to the house and immediately takes to his bed; is suffering from pain about his heart, at the waist line and shoulder, and from suffocation; was confined to his bed for two weeks and on getting up and out it is discovered that

physical exertion brings on heart palpitation, choking, suffocation, and if persisted in produces vomiting.

"During the month of April following the accident he went into the mine and not returning as soon as expected a man is sent who finds him leaning against the wall of an incline tunnel, exhausted and helpless and with the assistance of another the two brought him out and to the house, after which he was not permitted to go alone. He can no longer perform labor as before because of exertion producing palpitation of the heart, choking and suffocation; the bed chamber of himself and wife is changed to downstairs because the climbing of the stairs produces palpitation; his sleep when lying down is often interrupted by choking and suffocation and is relieved only by his wife, at times others assisting her, raising him to a sitting position; the driving of a team from the camp to Wickenburg, or back, so exhausts him at times that he is required to go to bed for hours and requires the administration of restoratives before he can get about again.

"The patient grows worse as time passes, the character of his symptoms and suffering being the same but more aggravated and is produced with less exertion as time passes. For some time strychnine and other drugs seem to control the heart action so the patient can do things not requiring much exertion, but drugs finally
193 fail to have the effect of quieting the palpitation; he gradually grows worse until December, 1903, his limbs and feet begin to swell and continue to swell and grow worse until his death on the 6th day of February, 1904, the palpitation, suffocation, choking and vomiting coming on soon after the accident and continued down to his death, becoming more violent and frequent as time passes until the end; he was 62 years of age when he died.

"These facts assumed, Doctor, what, in your opinion, was the probable originating cause of death? And in giving your answer please disregard the anatomical conditions disclosed by the post mortem examination."

The answer to said question reading as follows:

"I attribute the originating cause of death to the injury of the heart received in the street railway accident." And the objection to said question and the answer thereto being made substantially as follows:

By Mr. Burks (plaintiff in error's attorney): "Defendant desires to object to Interrogatory 11 propounded to witness O. E. Plath on the ground and for the reason that the said interrogatory assumed conditions which have not been testified to upon the further grounds that the question was incompetent, immaterial and irrelevant and that it calls for an answer upon matters of fact which are the very issues to be determined by the jury and which amounts in substance to asking of this witness what verdict should be returned by this jury."

And further by Mr. Burks: "The question is whether death could have resulted from a blow on the head, not as to whether a particular blow on a particular man struck in a particular manner. Then it is improper because it calls for the exact question which the

jury must pass upon. That is the difference in this hypo-
194 thetical question. If the question called for an opinion whether a particular result could have been obtained in a particular manner then it might be proper, but in this case we submit it is absolutely improper in that it really calls for an answer by the witness, in his opinion, what verdict the jury should render in the case."

And further by Mr. BURKS: "Now the defendant objects to interrogatory number 11 propounded to Dr. Plath upon the ground that this hypothetical question assumes facts which were not in evidence and it is not based upon all the facts in evidence. In other words, it is based upon a wrongful hypothesis and calls for an opinion by the witness on matters of fact which should be determined by the jury and it amounts in substance to asking the witness to render the verdict which should be rendered by the jury in the case. It is based purely upon the evidence by the plaintiff and not all of that, and upon facts not introduced by the plaintiff. This question assumes that upon the return to Wickenburg on the 23rd the deceased took to his bed, which is not a fact. The evidence is that on the following day he drove Mr. McKee to Wickenburg. That on the 25th he returned, and the evidence is to the effect that two days later he went to Phoenix. Dr. Ward's testimony shows that he was in Phoenix on the 25th of March."

And further by Mr. BURKS: I think there has been no testimony introduced up to this time as to the physical condition of the deceased as outlined in the question. There is no medical testimony upon that point. There is no testimony to show deceased suffered from more severe palpitation than at first. There is no testimony by any one competent to testify what the physical condition was. Furthermore, we think if that question is to be put at this time it should assume all the facts which are now before the jury."

195 By the COURT: "No, I will let the evidence go in."

By Mr. BURKS: "We object to the ruling of the Court and save an exception.

8.

That the Supreme Court of Arizona erred in holding and deciding the trial court did not commit error in overruling defendant's objection to the hypothetical questions contained in Interrogatory No. 12 put to Dr. O. E. Plath and Interrogatory Nos. 11 and 12 put to Dr. E. Payne Palmer, the said questions and answers thereto being substantially the same as the question and answer set forth in assignment of error No. 7 above, and substantially the same objection being made to the questions and to the answers thereto.

9.

That the said Supreme Court of Arizona erred in holding and deciding that the verdict of the jury was not contrary to the instructions of the Court.

10.

That the said Supreme Court of Arizona erred in holding and

deciding that the trial court did not err in denying defendant's motion for a new trial."

II.

Statement of Portion of Transcript of Record Plaintiff in Error Thinks Necessary for Consideration of the Errors Above Stated and Therefore Designated to be Printed.

Plaintiff in error is of the opinion that all depositions introduced in evidence in the case and all the oral evidence introduced as shown by the reporter's transcript is necessary for the consideration of certain of the errors assigned, and hence includes all portions
496 of the transcript containing evidence introduced by either plaintiff or defendant in the form of depositions or otherwise in the portions of the transcript designated to be printed, which are as follows, to-wit:

1. All of Volume 1 of the transcript of record, being the first 181 pages of said transcript.

2. Extract from Volume 2 of transcript beginning on the top of page 182 and ending with the words: "about the case during recess" on page 184.

3. Extract from Volume 2 of transcript beginning with the words "George B. Upton called as a witness" on page 211 and ending with the words "cross-examination none" on page 220.

4. Extract from Volume 2 of transcript beginning with last line on page 222 and ending with the words "the objection is sustained to that" on page 227.

5. Extract from Volume 2 of transcript beginning with the words "J. M. Jamison called as a witness" on page 231 and ending at the bottom of page 278.

6. Extract from Volume 2 of transcript beginning with the words "Dr. William Duffield called as a witness" on page 293 and ending with the words "for the benefit of the widow and family of the deceased" on page 436.

7. Extract from Volume 2 of the transcript beginning at top of page 455 to the end of the transcript.

CHALMERS & WILKINSON,
Attorneys for Plaintiff in Error.

I hereby acknowledge that a copy of the above statement of error on which plaintiff in error intends to rely, and of the parts
497 of the record which plaintiff in error designates to be printed, was served on me as attorney for Lee H. Landis, Administrator of the estate of George W. Sanders, deceased, defendant in error in the above entitled action, on this 22d day of June, 1911.

J. M. JAMISON,
Attorney for Defendant in Error.

498 [Endorsed:] 733, 22809. In the Supreme Court of the United States. Phoenix Railway Company, a Corporation, Plaintiff in Error, vs. Lee H. Landis, Administrator of the Estate of

George W. Sanders, deceased, Defendant in Error. Statement of Errors on Which Plaintiff in Error Intends to Rely and of the Parts of the Record Which Plaintiff in Error Designates to be Printed. Chalmers & Wilkinson, Attorneys for Plaintiff in Error.

499 [Endorsed:] File No. 22,809. Supreme Court U. S., October Term, 1911. Term No. 733. Phoenix Railway Co., Pl'ff in Error, vs. Lee H. Landis, Administrator, etc. Statement of errors and designation by plaintiff in error of parts of record to be printed. Filed September 19, 1911.

500 In the Supreme Court of the United States.

PHOENIX RAILWAY COMPANY, Plaintiff in Error,
vs.
LEE H. LANDIS, Defendant in Error.

Comes now the defendant in error in the above entitled cause, by J. M. Jamison his attorney, and enters his appearance herein.

And the defendant in error hereby designates additional parts of the record to be printed which he thinks necessary for the consideration of the Court in the determination of the assignments of error made by the plaintiff in error, as follows:

Beginning with the words, "By Mr. Jamison," in line nine at page 191 and ending with the words, "to be proven thereby," in line 18 at page 192, of the Transcript of Record, as prepared and certified by the Clerk of the Supreme Court of Arizona, relative to the offer in evidence of the plaintiff in the trial court of a certified copy of the inventory and appraisement of the estate of George W. Sanders, deceased.

September 7, 1911.

J. M. JAMISON,
Attorney for Defendant in Error.

501 [Endorsed:] 733. 22809. No. —. In the Supreme Court of the United States. Phoenix Railway Company, Pl'ff in Error, vs. Lee H. Landis, Defendant in Error. Appearance of Defendant in Error, and Designating Additional Parts of the Record to be Printed. J. M. Jamison, Attorney for Defendant in Error. Phoenix, Arizona.

502 [Endorsed:] File No. 22,809. Supreme Court U. S., October Term, 1911. Term No. 733. Phoenix Railway Company, Pl'ff in Error, vs. Lee H. Landis, Administrator, etc. Designation by defendant in error of parts of record to be printed. Filed September 19, 1911.

Endorsed on cover: File No. 22,809. Arizona Territory Supreme Court. Term No. 388. Phoenix Railway Company, plaintiff in error, vs. Lee H. Landis, administrator of the estate of George W. Sanders, deceased. Filed July 20th, 1911. File No. 22,809.

Supreme Court, U. S.
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Error.

SUBJECT INDEX

I. THE COURT BELOW ERRED IN HOLDING THAT THE COMPLAINT NEED NOT ALLEGE AND THE PLAINTIFF NEED NOT PROVE THE EXISTENCE OF BENEFICIARIES WHO HAVE SUSTAINED DAMAGES BY THE DEATH OF DECEASED.
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II. THE COURT BELOW ERRED IN HOLDING THAT THE ERROR OF THE TRIAL COURT IN GIVING TO THE JURY THE TWO INCONSISTENT INSTRUCTIONS NUMBERED 11 AND 13 DID NOT PREJUDICE THE DEFENDANT.
Pages 29-41, inclusive.

III. THE COURT BELOW ERRED IN HOLDING "THAT PLAINTIFF WAS ENTITLED TO RECOVER SUBSTANTIAL DAMAGES FOR THE BENEFIT OF THE ESTATE OF THE DECEASED WITHOUT EVIDENCE

SHOWING OR TENDING TO SHOW THAT DECEASED HAD EVER SAVED OR WOULD HAVE SAVED ANY PORTION OF HIS EARNINGS.
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Pages 70-90, inclusive.

Cases, Statutes and Authorities

Alaska, Carter's Ann. Code Civil Proc., Sec. 353. Brief Page 24.

Am. & Eng. Encyc. (2nd ed.), Vol. 21, p. 498. Brief Page 43.

Andrews vs. C. M. & St. P. Ry. Co. (Ia.), 53 N. W. 399. Brief Page 23.

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Arizona Laws of 1907, ch. 74, Sec. 15. Brief Page 69.

Arizona, R. S. 1877, ch. 54. Brief Pages, 14, 15.

Arizona, R. S. 1887, Pars. 2145-2155. Brief Pages 10, 11-14.

Arizona, R. S. 1901, Title 22 (Brief Page 25), Pars. 1049 (Brief Page 68), Pars. 2764-2766 (Brief Pages 9, 10, 16, 17).

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California Navigation & Imp'v't Co., in re, 110 Fed. 670. Brief Pages 51, 52.

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Iowa Code 1897, Sec. 3313. Brief Page 24.

Jacksonville Electric Co. vs. Bowden (Fla.), 45 So. 755. Brief Page 46.

James vs. Richmond, etc., R. R. Co., 92 Ala. 231. Brief Page 23.

Kelley vs. Union Pacific Ry. Co. (Mo. App.), 125 S. W. 818. Brief Page 19.

Kelly vs. Central R. R. of Iowa, 48 Fed. Rep. 663. Brief Pages 56-59.

Ladd vs. Foster, 31 Fed. Rep. 827. Brief Page 46.

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Leatherwood vs. Richardson (Ariz.), 94 Pac. 1110. Brief Page 77.

Lord's Oregon Laws 1910, Sec. 380. Brief Page 24.

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Mestas vs. Diamond Coal & Coke Co. (Wyo.) 76 Pac. 567. Brief Page 18.

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North Carolina, Revisal 1905, Secs. 59, 1[illegible]. Brief Page 24.

Orgall vs. Burlington, etc., R. R. (Neb.), 64 N. W. 450. Brief Page 21.

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Roach vs. Imperial Mining Co., 7 Fed. Rep. 698. Brief Page 22.

Rouse vs. Detroit Electric Ry. (Mich.), 87 N. W. 68. Brief 21.

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Serensen vs. Northern Pacific Ry., 45 Fed. Rep. 407. Brief Page 46.

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Standard Oil Co. vs. Parkinson, 152 Fed. Rep. 681. Brief Pages 35, 36.

Thorpe vs. Coal Co. (Utah), 68 Pac. 145. Brief Page 19.

Tiffany, Death by Wrongful Act. Brief Pages 19, 23, 26, 43, 44.

Utah Savings & Trust Co. vs. Coal Co. (Utah), 73 Pac. 524. Brief Page 19.

Van Brunt vs. Cincinnati G. & M. R. Co. (Mich.), 44 N. W. 321. Brief Page 21.

Vicksburg & Meridian R. R. vs. O'Brien, 119 U. S. 99. Brief Page 70.

Virginia, Code 1904, Sec. 2904. Brief Page 24.

Ward vs. Cochran, 150 U. S. 597. Brief Page 63.

Washington, Rem. & Ball. Code of, 1909, Sec. 183. Brief Page 24.

Warner vs. R. R. Co., 94 N. C. 250. Brief Pages 22, 23.

West Virginia Code 1906, Secs. 3488, 3489. Brief Page 24.

Wigmore, Evidence, Sec. 683. Brief Page 88.

Wyoming, Comp. St. 1910, Secs. 4201, 4202. Brief Page 18.

Wyoming, R. S. 1889, Secs. 3448, 3449. Brief Page 18.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1913.

No. 61

PHOENIX RAILWAY COMPANY, Plaintiff in Error,

vs.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action at law, begun in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, by the defendant in error for the

alleged wrongful killing of defendant's in error intestate, George W. Sanders (R., 1-3). The parties on this record will hereafter be referred to as defendant and plaintiff respectively.

The evidence in the case establishes that on March 20, 1902, Sanders, while riding as a passenger in one of defendant's cars, seated on one of the front lateral seats thereof, was either thrown or fell therefrom as the car was rounding a curve at the northeast corner of the Capitol grounds, in the City of Phoenix, Arizona, (R., 26-30, 34-40, 53-60). About twenty-three months thereafter, that is to say, on February 6, 1904, Sanders died, and on March 18th following his widow and administratrix, Clara W. Sanders, filed a complaint, alleging that the death of her husband and intestate was the proximate result of the injuries received by him on March 20, 1902, by reason of defendant's negligence, and claiming damages in the sum of $10,000 (R. 1-3). The decedent's widow left Arizona before the case was tried, and the present defendant in error was appointed administrator of Sanders' estate and was substituted as plaintiff in the action in her stead (R. 5-6, 21).

The case came on for trial on May 22, 1908 (R., 22), after numerous postponements and continuances (R., 15-21). The plaintiff's evidence was based upon the theory that the de-

cedent's death was the proximate consequence of defendant's alleged negligence (R., 26-81, 90-122). The defendant's evidence was directed to show that at the time of deceased's injuries in the street car accident, he was suffering from severe internal disabilities which of themselves were sufficient to have produced his death had he not fallen or been thrown from defendant's car (R., 86, 88, 122-184). To this end defendant introduced deceased's sworn declarations for an increase of his pension, allowed for disabilities incurred by him while serving in the Army, dated June 7, 1890, and January 15, 1903 (R., 86, 88). In the former declaration deceased stated that he was suffering from disease of the lungs resulting from measles incurred during his military service. As justifying an increase of his pension, he stated:

> "My Lung trouble is more severe and are affected more severely by slight causes, colds or exposure, which last much longer now than before. At times when so affected I am unable to do anything for months. I am now suffering nearly as much as when I was having frequent hemorrhages. My cough is increasing and I raise more from my lungs, have more constant pain in my chest and under shoulder blades."

In his declaration of January 15, 1903 (R., 88), ten months after he was injured while a passenger on defendant's car, he stated:

> "That he (Sanders) believes himself to be entitled to an increase of pension on account of increased disability from causes already pensioned; and a Heart trouble, resultant from causes noted above, which were contracted in the Army, and while in the line of duty."

For this same purpose defendant introduced the testimony of Dr. William Duffield (R., 122-148), who said that he had examined deceased in 1897 or 1898, at which time the latter "was beginning to get arterial sclerosis, a hardening of the arterial system," though he was unable to state that deceased then had a heart lesion (R., 122-123). Defendant also produced medical experts who testified in answer to hypothetical questions, which contained, among other things, a description of the physical condition of deceased as disclosed by the autopsy over his body, that in their judgment the fall sustained by Sanders from defendant's car could not alone have caused his death, and that in their opinion deceased was suffering from and died as a result of chronic endocarditis, a condition not produced by falls or external injuries (R., 158-165, 168-181).

The jury returned a verdict of $5,000 in favor of plaintiff and judgment was entered thereon (R., 8-9). Defendant took an appeal to the Supreme Court of the Territory of Arizona, which affirmed the judgment of the trial court (R., 194-197). A rehearing was had in the Supreme Court, without, however, securing the alteration of the judgment of affirmance theretofore entered in the cause (R., 197-200).

ASSIGNMENT OF ERRORS.

The errors assigned in this Court (R., 201-207) reduce themselves to these five propositions, which will be discussed in the order named:

1. The court below erred in holding that the complaint need not allege and the plaintiff need not prove the existence of beneficiaries who have sustained damages by the death of deceased.

2. The court below erred in holding that the error of the trial court in giving to the jury the two inconsistent instructions numbered 11 and 13 did not prejudice the defendant.

3. The court below erred in holding "that plaintiff was entitled to recover substantial damages for the benefit of the estate of the deceased without evidence showing or tending to

show that deceased had ever saved or would have saved any portion of his earnings."

4. The court below erred in holding that defendant was barred of its right to complain of the error of the trial court in giving instruction number twelve, by its failure to ask for an instruction on the measure of damages at the trial.

5. The court below erred in holding that the trial court properly overruled defendant's objections to interrogatories numbers 11 and 12 propounded to Dr. O. E. Plath and Dr. E. Payne Palmer.

ARGUMENT

I.

THE COURT BELOW ERRED IN HOLDING THAT THE COMPLAINT NEED NOT ALLEGE AND THE PLAINTIFF NEED NOT PROVE THE EXISTENCE OF BENEFICIARIES WHO HAVE SUSTAINED DAMAGES BY THE DEATH OF DECEASED.

The sufficiency of the plaintiff's complaint in the respect indicated was raised by the general demurrer interposed thereto (R., 7).

In holding that the existence of beneficiaries who have sustained damage by reason of deceased's death need not be alleged and proved, the court below followed its decisions in **Southern Pacific Company vs. Wilson**, 10 Ariz. 162, 85 Pac. 401, and in **De Amado vs. Friedman** (Ariz.), 89 Pac. 588. In the former case the statute, under which this action was brought, received its first interpretation by the Supreme Court of the Territory. The court there held that the Arizona statute authorized the recovery of damages suffered by deceased's estate, and not such dam-

ages as designated beneficiaries might sustain through loss of support or of other pecuniary assistance that they were entitled to receive and did receive from deceased during his lifetime. The difference between these two measures of damages is marked. As was said in Carlson vs. Oregon Short Line (Ore.), 28 Pac. 407, 500 "that (the damage) to the estate is measured as nearly as can be by the value of the life lost, and that to the beneficiaries by the value of the life lost to them." To illustrate: the personal representative of a deceased, upon whom no one is dependent for support or pecuniary aid, and who, through industry and thrift, has accumulated a considerable estate, would, under a statute allowing damages on the basis of loss to deceased's estate, recover substantial damages, while under a beneficiary statute no damages at all would be recoverable; on the other hand, those dependent upon a deceased of similar habits, whose income is consumed in supporting his family, would recover nothing under the former type of statute, but would recover substantial damages under a statute of the latter type.

The Wilson case was decided by the Supreme Court of Arizona in 1905, that is to say, two years after the present action was begun (R., 3).

The statute under which this action was brought is as follows:

"2764. Whenever the death of any person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree or manslaughter.

"2765. Every such action shall be brought by and in the name of the personal representative of such deceased person; and provided, that the father, or in case of his death or desertion of the family, the mother may maintain the action for the death of a child; and the guardian for the death of his ward, and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estate left by persons dying intestate.

"2706. In every such case the jury shall give such damages as they shall deem fair and just, not exceeding five thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Provided, that every such action shall be commenced wtihin one year after the death of such deceased person. If the defendant in any such action die pending the suit, his executor or administrator may be made a party and the suit be prosecuted to judgment as though such defendant had continued alive. The judgment in such case, if rendered in favor of the plaintiff, shall be paid in due course of administration." Rev. Stat., Arizona 1901, Par. 2704-2706.

The court construed the statute as allowing only damages suffered by the estate, on the theory of implied repeal, because the earlier statute allowing recovery for death by wrongful act (Act of 1887, R. S. 1887, 2145-2155) expressly stated that the action was for the benefit of certain designated beneficiaries and because this language was not repeated in the act of 1901, supra. The act of 1887 was judicially construed as creating a cause of action in favor of the beneficiaries designated therein. See Southern Pacific Company vs. Tomlinson, 163 U. S. 369. The earlier act, for which the

act of 1901 was substituted, provided (Rev. Stat. 1887—Title XXXVI, INJURIES RESULTING IN DEATH—Pars. 2145-2155):

"2145 (Sec. 1). An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

"1. Where the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, steamboat, stage-coach or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross negligence, or carelessness of their servants or agents.

"2. When the death of any person is caused by the wrongful act, negligence, unskilfulness or default of another.

"2146 (Sec. 2). The wrongful act, negligence, carelessness, unskilfulness, or default mentioned in the preceding section must be of such a character as would, if death had not ensued, have entitled the party injured to maintain action for injury.

"2147 (Sec. 3). When the death is caused by the willful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered.

"2148 (Sec. 4). The action may be commenced and prosecuted, although the death shall have been caused under such circumstances as amounts in law to a felony, and without regard to any criminal proceeding that may or may not be had in relation to the homicide.

"2149 (Sec. 5). The action shall be for the sole and exclusive benefit of the surviving husband, wife, children or parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

"2150 (Sec. 6). The action may be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all.

"2151 (Sec. 7). If the parties entitled to the benefit of the action shall fail to commence the same within six months after

the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same.

"2152 (Sec. 8). The action shall not abate by the death of either party to the record if any party entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money may by order of the court be made plaintiff and the suit be prosecuted to judgment in the name of such plaintiff for the benefit of the persons entitled.

"2153 (Sec. 9). If the sole plaintiff dies pending the suit and he is the only party entitled to the money recovered, the suit shall abate.

"2154 (Sec. 10). If the defendant die pending the suit his executor or administrator may be made a party and the suit be prosecuted to judgment as though such defendant had continued alive. The judgment in such case, if rendered in favor of the plain-

tiff, shall be paid in due course of administration.

"2155 (Sec. 11). The jury may give such damages as they may think proportioned to the injury resulting from such death, and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict." Act of March 10, 1887.

The statute of Arizona, preceding the act of 1887, creating a cause of action for death by wrongful act, was as follows (Chap. 54, R. S. 1877):

"(3238) Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages; notwithstanding the death of the person injured, and although the death shall

have been caused under under such circumstances as amount in law to felony.

"(3239) Section 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person; provided that no moneys so recovered shall be applied in discharge of any debts or liabilities of the person so killed, nor pass into the hands of his executors or administrators as assets of his estate."

This provision was borrowed from the old California Act of 1862.

It is submitted that the purpose of the legislature in substituting the act of 1901 for that of 1887 was merely to simplify the provisions of

the law allowing recovery in cases of wrongful killing by consolidating the actions which the act of 1887 allowed to the several specified beneficiaries into a single action to be brought by deceased's personal representative, and that the absence from the act of 1901 of a clause corresponding in exact language with that of section 5 of the act of 1887 does not evidence an intention on the part of the legislature to make a fundamental change in the law of Arizona relating to injuries resulting in death.

Under the act of 1887 in cases where there were several beneficiaries, juries were inclined to find excessive verdicts. Thus in **Southern Pacific Co.** vs. **Tomlinson**, 163 U. S. 369, the verdict was for $50,000. Inasmuch as a remittitur on behalf of minors was impossible a defendant was enabled to defeat a meritorious case by successive reversals on the ground of excessive recovery. This, it is submitted, was the situation which the act of 1901 was primarily intended to remedy, and in doing so reenacted in a large measure the language of the act of 1877. It is true that the language of the act of 1877 italicized in the quotation supra is not repeated in the act of 1901, but it is submitted that a fair construction of the latter act requires that this language be read into the statute.

Paragraph 2705 of **Rev. Stat. of Arizona**,

1901, expressly provides "the amount recovered * * * **shall be distributed to the parties** and in the proportions provided by law in relation to the distribution of personal estate left by persons dying intestate." This, it is submitted, shows that although suit must be brought in the name of the deceased's personal representative, the action is for the benefit of the next of kin since the damages are distributable among them, and that therefore the damages must be assessed on the basis of the loss to the next of kin in the support and pecuniary assistance they might reasonably expect and be entitled to from the deceased had he lived during the remainder of his life expectancy. Immediately after the clause above quoted, paragraph 2766 goes on to provide that "in every such case the jury shall give such damages as they shall deem fair and just." This clause obviously means "fair and just" to deceased's next of kin and reinforces the argument that the measure of damages is the loss sustained by them and not by deceased's estate. It is worthy of mention that counsel for the plaintiff in the trial court assumed that under the act of 1901 the damages recoverable are such as the beneficiaries of deceased's estate sustain (R. 95).

In Southern Pacific Company vs. Wilson, 85 Pac. 401, 403, in which the act of 1901 received

its first authorative construction, the Supreme Court of Arizona stated that that act "was taken from the statutes of Wyoming." The Arizona act of 1901 is practically identical with Sections 3448 and 3449, Rev. Stat. of Wyoming, 1889, also found in Comp. Stat. Wyoming, 1910, Sections 4291 and 4292. No decision of the Supreme Court of Wyoming has been found in which there was involved the question as to whether or not the statute of that state creates a cause of action in favor of the estate of the deceased wrongfully killed or in favor of designated beneficiaries, but the practice in that State is to allege and prove the existence of persons dependent upon the deceased and the damage sustained by them through loss of support, etc. In the case of **Mestas vs. Diamond Coal & Coke Co.** (Wyo.), 70 Pac. 567, brought under the Wyoming statute, the petition alleged that the deceased "was 26 years of age at the time of his death, and left surviving him a wife, aged 23 years, and two daughters, aged 3 years and 1 year, respectively, all of whom were dependent upon deceased for maintenance, support and education; and that deceased was, prior to his death, of good health and strength, and industrious habits, was able to support himself and family well, and was earning about $80 per month." In the case of **Burton vs. Union Pacific Coal Co. (Wyo.)**, 107, Pac. 391, 392, which also arose under the Wy

oming statute, the petition contained analogous averments.

In the cases involving the Wyoming statute which have come before it, the Supreme Court of Utah seems to have treated that statute as allowing damages sustained by persons dependent upon deceasd. See **Thorpe vs. Coal Co.**, 68 Pac. 145; **Utah Savings & Trust Company vs. Coal Co.**, 73 Pac. 524; **In re Lowham's estate**, 85 Pac. 445. In **Kelley vs. Union Pacific Ry. Co.**, 141 Mo. App. 490; 125 S. W. 818, 819, the Court of Appeals of Missouri used language implying that the Wyoming statute creates a cause of action for designated beneficiaries. Speaking of that statute, the court said:

> "The administrator is a mere trustee to maintain an action for the benefit of those entitled to the damages, as they are named in the statute."

Tiffany, Death by Wrongful Act (2nd ed.), Sec. 24, states in effect that under the Wyoming statute the damages recoverable are such as result to the beneficiaries from the death.

That the language of the Arizona act of 1901 is not such as to require the interpretation given it in **Southern Pacific Company vs. Wilson**, supra, and followed by the court below in

this case, is further shown by the decision of the Supreme Court of Michigan, in which state the language of the statute is practically identical with that of the Arizona act of 1901, which decisions are to the effect that the damages recoverable are such as the next of kin sustain through loss of support, etc. How. Stat., Mich., Sec. 3392, applying only to railroads, street railways, etc., provides:

> "Every such action (i. e., action for wrongful killing) shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in any such action shall be distributed to the persons, and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such case the jury may give such amount of damages as they shall deem fair and just, to the persons who may be entitled to such damages when recovered * * * ."

Under this statute the Supreme Court of Michigan held, in affirming a judgment of nonsuit in a case where it appeared that deceased had a father and brother, the former of whom was deceased's distributee under the statute of distributions, but where it did not appear that

any one was dependent on deceased, as follows (**Van Brunt vs. Cincinnati G. & M. R. Co.**, 44 N. W. 321, 323):

> "In this case the proofs showed no person pecuniarily injured by the death of plaintiff's intestate. **No action lies in this case out of the mere relation of father and child.** The father was in no way injured by the loss of his son's earnings, or deprived of any reliance for his own support."

See also **Hurst vs. Detroit City Ry. Co.** (Mich.), 48 N. W. 44, and **Rouse vs. Detroit Electric Ry.**, 128 Mich. 149; 87 N. W. 68.

Likewise the Supreme Court of Nebraska has construed the statute of that state, allowing recovery for injuries resulting in death, which resembles the Arizona act of 1901 very closely in its language, as providing for the assessment of damages on the basis of the loss sustained by persons dependent upon deceased. Neb. Comp. Stat., Ch. 21, Secs. 1 and 2; also Cobbey's Ann. Stat. 1911, Sec. 5200; **Orgall vs. Burlington, etc., R. Co.**, 64 N. W. 450; **C. B. & Q. vs. Bond**, 78 N. W. 710.

The authorities cited by the Supreme Court of Arizona in the Wilson case hardly justify the conclusion there reached with respect to

the proper interpretation of the Arizona act of 1901. One case, **Roach vs. Imperial Mining Company,** 7 Fed. Rep. 698, construing the Nevada statute allowing recovery for death by wrongful act (Sec. 115 Comp. Laws, p. 39) follows the rule of damages precisely opposite to that adopted in the Wilson case. **Hedrick vs. Ilwaco Ry. Co. (Wash.),** 30 Pac. 714, has no bearing upon the point in issue in the Wilson case. In **Madden vs. C. & O. Ry. Co.,** 28 W. Va. 610, it does not appear what rule of damages is followed in West Virginia. Some of the language of the opinion of the court in **Balto. & Ohio R. R. Co. vs. Wightman,** 29 Grat. 431, 442-443, leads to a result directly opposite to that reached in the Wilson case. In the case cited the court said:

> "All the cases agree that where the deceased has left a widow and children it is proper for the jury in assessing the damages, to estimate the value of the support and maintenance properly derived from the deceased, the amount realized by him from his usual occupation, as also the loss of his care, nurture and instruction."

Moreover under the Virginia statute the amount recovered is to be treated as assets of deceased's estate in case he is not survived by a wife or children. **Warren vs. R. R. Co.,** 94

N. C. 250, was decided under a statute providing that if deceased leaves no next of kin the damages recovered shall be paid over to the University of North Carolina. **James vs. Richmond, etc., R. R. Co.,** 92 Ala. 231; 9 So. 339, was decided largely on the ground that "the law presumes there would be surviving relations entitled to inherit." In the remaining cases—**Holmes vs. Oregon, etc., Ry. Co.,** 5 Fed. Rep. 523; **Perham vs. Portland Electric Co.,** 33 Ore. 451, 53 Pac. 14; **Anderws vs. C. M. & St. P. Ry.** (Iowa), 53 N. W. 399; **Givens vs. Kentucky Ry.** (Ky.), 12 S. W. 257—the statutes involved provided either that the amount recovered should be treated as assets of deceased's estate available for the satisfaction of the claims of deceased's creditors, etc., or that if deceased was not survived by persons designated in the statute, the damages recovered should be so disposed of. This analysis shows how little support in the decisions of the courts of other states and territories the Supreme Court of Arizona was able to find for its construction of the Arizona act of 1907.

In only nine States and Territories does the law, either by express enactment or by judicial construction, provide that the damages in cases of injuries resulting in death shall be such as deceased's estate sustains. **Tiffany, Death by Wrongful Act** (2nd ed.), Sec. 25. Those States and Territories are Alaska, Iowa, Ken-

tucky, North Carolina, Oregon, Virginia, Washington, and West Virginia, in addition to Arizona. The statutes of Alaska, Iowa, Kentucky, Oregon and Virginia provide either that the recovery shall become part of the personal estate of deceased, subject to the claims of creditors, etc., or that in the event that deceased is not survived by persons designated in the statute, the damages awarded shall be so treated.

Alaska: **Carter's Ann. Code Civil Proc.**, Sec. 353.

Iowa: **Code 1897**, Sec. 3313.
Kentucky: **Ky. St. 1909**, Sec. 6.
Oregon: **Lord's Oregon Laws, 1910**, Sec. 380.

Virginia: **Code 1904**, Sec. 2904.

Under the Washington statute, the action for wrongful killing abates if deceased does not leave surviving him any of the persons named in the statute. **Rem. & Ball. Code 1909**, Sec. 183. As previously stated, the North Carolina statute, **Revisal 1905**, Secs. 59, 153, provides that if deceased leaves no next of kin the damages recovered shall be paid over to the University of North Carolina. The West Virginia statute, **Code 1906**, Secs. 3488, 3489, is substantially the same as the Arizona act of 1901.

This difference in the statutes of the States and Territories, where the rule of damages announced in the Wilson case prevails, and the Arizona act of 1901, is, it is submitted, of fundamental importance. If the construction of the Arizona act of 1901 laid down in that case be followed to its logical conclusion, a deceased's personal representative may recover substantial damages and hold the same free from the claims of deceased's creditors, if deceased leaves no next of kin. Not even the Territory can lay claim to a sum so recovered. The Arizona statute on Escheat (Title 22, R. S. of 1901) provides:

> "If any person shall **die seized** of any real estate **or possessed** of any personal estate, such estate shall escheat to and vest in the Territory."

This is a result that is possible in no other State or Territory, except possibly West Virginia, where the rule of damages measures the recovery by the loss sustained by a deceased's estate, and argues persuasively that the fact that this rule may prevail elsewhere does not warrant its introduction into Arizona under the act of 1901.

In the great majority of the States and Territories the damages recoverable are such as

the persons dependent upon deceased sustain. **Tiffany, Death by Wrongful Act,** Sec. 24. To this extent the statutes almost uniformly follow the type statute, Lord Campbell's Act of 1846, 9 and 10 Vict. c. 93. **Ibidem,** Secs. 19-24. In view of this and of the further fact that the assessment of damages on the basis of the loss suffered by persons dependent upon deceased operates more equitably in practice than an assessment based upon loss to deceased's estate, because it compensates those upon whom the real burden of the wrong falls, it is submitted, that in the absence of language expressly providing for the recovery of damages that have been suffered by deceased's estate, a court is not warranted in construing a statute, giving a cause of action in cases of wrongful killing, as providing for the assessment of damages on that basis. It has been pointed out heretofore that the Arizona Act of 1901 contains no express language sanctioning such an assessment, and that on the contrary a fair construction of the act, unbiased by a consideration of the language of the act of 1887, warrants a holding that the act of 1901 contemplates a recovery of damages on the basis of the loss suffered by persons dependent upon deceased. It is submitted, therefore, that although this court ordinarily follows the decisions of the Supreme Court of a territory on matters of local statutory construction and of local practice, nevertheless the language of the

act of 1901 and the consequences of following the construction thereof adopted by the Supreme Court of Arizona, are such as to justify this court in rejecting that construction and adopting one that is consonant with the construction put upon the laws of the great majority of the states and territories as well as the federal statutes covering the same subject matter.

In **Southern Pacific Company vs. Tomlinson,** 163 U. S. 369, this court overruled the Supreme Court of Arizona in a case involving the application of the act of 1887. In that case, the jury returned a verdict for $50,000, to be divided in specified shares among the widow, children and father and mother of deceased. The widow filed a **remittitur** on behalf of herself and the other persons entitled to share in the award, thereby reducing the verdict to $18,002. The territorial Supreme Court sustained the judgment on the reduced verdict, as a reasonable one. This court, however, held the **remittitur** on behalf of the children and mother and father of deceased was ineffective, and reversed the judgment because the damages awarded were excessive. This case shows that this court will, in a proper case, examine the construction of a territorial statute as laid down by a territorial court, and examine also questions of local practice, and if such con-

struction or practice is erroneous, will correct the same.

If this court adopts the construction of the Arizona act here contended for, then, it is submitted, the judgment below should be reversed. The mere fact that the evidence may have disclosed the existence of beneficiaries entitled to take under the statute does not remedy the fatal omission of the complaint to allege the existence of such beneficiaries and the quantum of damage suffered by them, on the general principle that a complaint that fails to state a cause of action will not support a judgment for the plaintiff.

Consolidated Canal Co. vs. Peters, 5 Ariz. 80; 46 Pac. 74.

McPherson vs. Hattich, 10 Ariz. 104; 85 Pac. 731.

Sandoval vs. Randolph, 11 Ariz. 371; 95 Pac. 119.

Moreover, the case was given to the jury upon the theory for the most part that only damages to deceased's estate were recoverable, excepting in so far as instruction No. 13 presented a different theory for the assessment of damages. Of this latter more will be said under the second main head of this brief.

II.

THE COURT BELOW ERRED IN HOLDING THAT THE ERROR OF THE TRIAL COURT IN GIVING TO THE JURY THE TWO INCONSISTENT INSTRUCTIONS NUMBERED 11 AND 13 DID NOT PREJUDICE THE DEFENDANT.

The instructions referred to are as follows (R., 187, 188):

"If from the evidence given in the case, and the instructions I have given, you find for the plaintiff, then you will award such damages as you may deem fair and just, such as will fairly compensate the estate of the deceased for the loss sustained by reason of the death of the deceased, not exceeding, however, the sum of Five Thousand Dollars.

"I charge you, however, that it is not necessary on the part of the plaintiff to show the precise money value of the life of the deceased or the exact amount of damages suffered by the beneficiaries in order to sustain a recovery for substantial damages. However, the suit restricts the finding in any such case not only to Five Thousand Dollars but

to such damages as, under the proof in the case, shall be deemed by the jury to be fair and just."

It is important to observe first of all that both of these instructions relate to the same element of plaintiff's case, namely the measure of damages by which the jury should be guided in case it should decide that plaintiff died from injuries received as a result of defendant's negligence. Consequently, it is of prime importance that they should be harmonious and not inconsistent, so that the jury might not be misled. The court below conceded that the use of the word "beneficiaries" in instruction No. 13, was "technically inappropriate" (R., 195) but held nevertheless that the error in using this word was harmless. This conclusion seems to have been based, in a large measure, upon the following deduction of the court (R., 195):

"It is not wholly inapt to refer to the estate as the "beneficiary, where, as in this Territory, the damages to be recovered by an administrator are such as the estate has suffered."

It may be conceded that the statement cannot be gainsaid as far as the word **beneficiary** is concerned, but it is certainly inapt to refer to the estate as the **"beneficiaries."**

Defendant contends that the vice of these two instructions lies in the fact that instruction No. 11 directs the jury, in unequivocal language, to assess the damages recoverable on the basis of loss to deceased's estate while instruction No. 13 by necessary implication directs an assessment on the basis of loss to the beneficiaries. It is true that instruction No. 13 does not in terms so direct the jury. But it is submitted that the charge "that it is not necessary on the part of the plaintiff to show the precise money value of the life of the deceased or the exact amount of damages suffered by the beneficiaries in order to sustain a recovery for substantial damages," necessarily carries with it the implied charge "that the plaintiff is entitled to substantial damages if he has proved by a fair preponderance of the evidence the approximate money value of the life of the deceased, or the approximate amount of damages suffered by the beneficiaries."

This analysis demonstrates that instructions Nos. 11 and 13 are not harmonious, since the former is obviously based upon the theory of loss to deceased's estate and the latter upon the theory of loss to persons dependent upon deceased. The question as to whether or not the giving of these instructions was prejudicial to defendant requires the answering of two preliminary questions: Is the rule announced in instruction No. 11 distinct and different from

so as to require allegation and proof of their existence and the loss to them, as if they had been designated; or, in other words, whether the action is one for damages to beneficiaries or for damages to the estate. **The materiality of the inquiry is evident, since it is apparent that the element of damages differs greatly in the two cases.** In the one, the question is the amount of damage to the designated persons themselves by reason of the death; in the other the amount of damages to the estate by reason thereof.

* * * * * * * * *

In the one case, allegation and proof of the existence of the beneficiaries and the loss to them is necessary; in the other, such allegation and proof is unnecessary, the proof being directed to the loss to the estate."

Whatever construction of the Arizona Act of 1901 is adopted as controlling, whether that announced in **Southern Pacific Company vs. Wilson**, supra, or that contended for in the argument under the first assignment of error, makes no difference in this connection, since the rules of the damages allowable announced **in instructions Nos. 11 and 13** are mutually exclusive. If the statute be held to allow the recovery of such damages as the deceased's estate suffers then instruction No. 13 is erro-

that embodied in instruction No. 13 in point of law? and in the light of the evidence in the case, is it likely that the jury was misled by these inconsistent instructions?

The radical difference between the rule of law directing the assessment of damages on the basis of loss sustained by deceased's estate and that providing for an assessment on the basis of loss suffered by persons dependent upon deceased, has been pointed out in the argument under the first assignment of error. Indeed the Supreme Court of Arizona expressly recognized the difference in practical operation between these two rules of damages in the case of **Southern Pacific Company vs. Wilson**, 10 Ariz., 162; 85 Pac., 401, 402. The court said:

> "In a number of states, however, the statutes neither make mention of designated beneficiaries, nor provide that the damages recoverable are such as shall have been sustained by persons designated. In other words, they do not preserve either the second or third feature of the original act (Lord Campbell's act). Under such statutes the question that arises, is, whether, notwithstanding the failure to preserve in terms these features, the action is nevertheless one for the benefit of the family or next of kin,

neous; if, on the other hand, the statute be considered to require the awarding of such damages as persons dependent upon deceased sustain, then the giving of instruction No. 11 was erroneous.

The question as to whether or not the evidence in the case is sufficient to sustain a verdict under the first theory of damages, is discussed later on in this brief. The further question: Is the evidence sufficient to sustain a verdict under the latter theory of damages? should, it is submitted, be answered in the affirmative.

The complaint alleges that deceased left "surviving him as sole heirs at law one son, Geo. E. Sanders, one daughter, Ida C. Osgood, and his widow, the plaintiff." (R., 2.)

The evidence bears out this allegation (R., 101). It is true that it appears elsewhere in the record (R. 34, 107) that the son and daughter were of age, and since there is no evidence that they were maintaining the family relation with deceased, the presumption is that they were not dependent upon him, and could not, on the beneficiary theory of damages, be entitled to a recovery. But it also appears that deceased's wife was living with him, and was supoprted by him (R., 93, 101, 103, 104). It appears further that at the time of the accident

deceased was earning a salary plus the keep of himself and wife (R., 101). This evidence it is submitted was sufficient to justify a submission of the case to the jury on the beneficiary theory of damages. It is well settled that where an action for wrongful killing is brought for the benefit of the wife or minor children of deceased, proof that deceased was earning wages at the time of his death and that the family relation existed between the deceased and such widow or minor children, is sufficient to authorize a substantial recovery.

In the case of **Peden vs. American Bridge Co.**, 120 Fed. Rep., 523, 524, the court said:

> "It is well settled that, where the relation of husband and wife or parent and child exists, the law presumes pecuniary loss from the fact of death."

In **Standard Oil Co. vs. Parkinson**, 152 Fed. Rep., 681, 685, the Circuit Court of Appeals, Eighth Circuit, states the same rule as follows:

> "If the beneficiaries of the statute in this action had been collateral heirs of the deceased or persons not legally dependent upon him in his lifetime, proof of their dependence upon him or of pecuniary injuries to them

from his death would have been indispensable to a substantial recovery. * * *

"Proof of this nature is unnecessary where the beneficiaries are the widow and minor children of the deceased and where the prima facie legal presumption of their dependence is not overcome by countervailing evidence. But this is because they are legally dependent upon the husband and father during his lifetime, and the presumption of law consequently is that they are pecuniarily injured by his death."

In **Archbald vs. Lincoln County**, 50 Wash., 55; 96 Pac. 831, 833, where the damages recovered would inure to the benefit of deceased's widow and minor children, the court said:

"It is lastly contended that there was no proof of damage. The testimony showed the age of deceased, his life expectancy and his earning capacity. This was ample to enable the jury to assess the damages."

But even conceding that the evidence was not **legally** sufficient to sustain a verdict computed on the beneficiary theory, can it be said **as a matter of fact** that the jury did not reach its verdict as a result of such a computation?

Is it not reasonable to suppose that under instruction No. 13 the jury sought to assess damages on the theory of loss sustained by the beneficiaries, just as under instruction No. 11 the jury in all reasonable probability, attempted to ascertain the loss suffered by deceased's estate? Would not the result be either that the jury awarded damages under both theories, that is awarded double damages, or if only one theory were made the basis of the award, is it not now impossible to say which theory was adopted by the jury, and since one theory is necessarily wrong, was not the giving of these inconsistent instructions necessarily prejudicial to the defendant?

The proposition that the giving of inconsistent instructions constitutes reversible error as a matter of law is well settled. The rule of law in this respect is stated as follows in **11 Ency. Pl. & Pr.**, 145-147, and the text is sustained by the citation of abundant authority, both state and federal:

> "Instructions should be so framed that they will not only state the law correctly, but be entirely in harmony with each other, in order that the jury may be aided and not misled in arriving at their verdict. Instructions which are inconsistent or contradictory, when asked, should, of course, be refused,

ant for the jury to inquire, whether McElligott continued at work longer than was reasonably sufficient for Smallwood to appoint some one to the duty of watching the bank while the plaintiff and his co-employe, Meacham, were at work. The time during which the plaintiff continued at work after giving the alleged notice, and after receiving an assurance that his request would be complied with, has no relation whatever to the only contingency in which the District, according to the special instructions, was liable, viz: its negligence in employing as supervisor of roads one who was unfit for the place. If the principles embodied in those instructions are sound—upon which point we are not now required to express an opinion—the court would have been justified in directing a verdict for the District. The charge was inconsistent with the instructions previously given, and was calculated to mislead the jury, for it submitted to them a question which those instructions had, in effect if not in terms, declared to be immaterial in the case."

The parallel between the circumstances in the case cited and those in the instant case are obvious and require no extended comment. In instruction No. 11 the jury was impliedly told

not to consider certain elements which in instruction number 13 they were impliedly charged constituted the measure of plaintiff's recovery.

The third assignment of error (R., 202), that "the said Supreme Court of Arizona erred in holding and deciding that the error of the trial court in giving instruction number 13 to the jury was not prejudicial to plaintiff in error" is based upon the assumption that the construction put upon the Arizona act of 1901 in **Southern Pacific Company vs. Wilson**, supra, will be held to be controlling. The argument, naturally falling under this assignment, has been presented in the course of the argument in support of the second assignment of error, and further discussion, therefore, is unnecessary.

III.

THE COURT BELOW ERRED IN HOLDING "THAT PLAINTIFF WAS ENTITLED TO RECOVER SUBSTANTIAL DAMAGES FOR THE BENEFIT OF THE ESTATE OF THE DECEASED WITHOUT EVIDENCE SHOWING OR TENDING TO SHOW THAT DECEASED HAD EVER SAVED OR WOULD HAVE SAVED ANY PORTION OF HIS EARNINGS."

This assignment of error, like the third assignment, supra, is based upon the construction of the Arizona Act of 1901, laid down in the Wilson case. There is no evidence in the case that at the time of the accident deceased had accumulated any property. The only evidence offered which by any stretch of the imagination tended to show that deceased had any property was a certified copy of the inventory and appraisement of deceased's estate on file in the Probate Court (R., 90), which was ruled out by the court as not proper evidence, and the statement of the witness Jamison that deceased had about $1,000 coming to him at the time of his death (R., 99). It does not appear, however, that deceased had saved this money. The omission to produce evidence of deceased's accumulations as a basis for the calculation of his probable accumulations during the remainder of his life expectancy, evidence which, had deceased in point of fact been of a saving disposition, should have been easily procurable by plaintiff is, it is submitted fatal to plaintiff's case. This omission cannot be supplied by a presumption of law that deceased left property and would have accumulated more during the remainder of his life expectancy, since, as was said in **Burk vs. Arcata R. R. Co.**, 57 Pac. 1065, 1066, "the majority of men die without much property." In this respect the present case is radically different from a suit under a beneficiary statute

for the benefit of the widow or minor children of a deceased in which there is a presumption of damage by reason of the relationship of the beneficiaries to the deceased and the legal obligations arising therefrom, as was shown by cases cited earlier in the brief.

The act of 1901 merely extends the common law principles governing actions for negligence to cases of negligent killing, and while it thereby creates a cause of action where none existed before, moulds such action according to common law rules in analagous cases. At common law there can be no negligence in a legal sense unless legal damages result from a defendant's action, or in other words legal damage is one of the necessary elements of actionable negligence. This rule is stated as follows in 21 Am. & Eng. Encyc. (2nd ed.) 498:

> "It is universally held that in order to impose liability for negligence, damage must have been sustained by the complaining party. The defendant is answerable for the consequences of negligence, and not for its abstract existence."

Tiffany, Death by Wrongful Act (2nd ed.) Sec. 180 states that on principle the action for wrongful killing should not be maintainable except upon proof of legal damage of a pecu-

niary nature. It is true that this statement is made more particularly with reference to actions under beneficiary statutes, but the language and logic used in reaching this conclusion are equally applicable to cases arising under statutes directing damages to be measured by the loss sustained by deceased's estate. In **Duckworth vs. Johnson**, 4 Hurl. & N., 653; 29 L. J. Ex. 25, Pollock, C. B., said, in construing the English statute:

> "If there was no damage the action is not maintainable. It appears to me that it was intended by the act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs."

Tiffany, Death by Wrongful Act (2nd ed.), Sec. 180, cites Michigan, Texas, Vermont and Wisconsin cases, as holding a similar rule, though in the latter part of the same section he also states that many jurisdictions allow the recovery of nominal damages upon proof of the wrongful killing alone. On the theory that legal damage is an essential element of plaintiff's case, the plaintiff was not entitled to recover any damages at all here because he failed to prove any loss to deceased's estate, and therefore to make out a prima facie case. Had

defendant asked for a directed verdict, either at the conclusion of plaintiff's case or after the evidence was all in, the court would have been obliged to grant its request. The entire absence of proof that defendant was guilty of an actionable wrong requires the reversal of the judgment below awarding substantial damages to plaintiff.

Conceding, however, for purposes of argument, that proof that deceased met death as a result of defendant's negligence made out a **prima facie case** without allegation or proof of special pecuniary loss to deceased's estate, it is submitted that plaintiff was entitled to recover only nominal damages, and that therefore the verdict of the jury is excessive and contrary to law and to the evidence in the case. In jurisdictions where damages recoverable for wrongful killing are measured by the loss suffered by deceased's estate, the rule of damages allows the plaintiff the present value of what deceased would probably have accumulated had he lived the remainder of his life expectancy. This is the rule also in actions under beneficiary statutes, where suit is brought for deceased's collateral kindred.

Carlson vs. Oregon Short Line, etc., Ry. Co. (Ore.), 28 Pac. 497, 499-500.

Perham vs. Portland, etc., Co. (Ore.), 53 Pac. 14, 19, 40 L. R. A. 709, 806-807.

Holmes vs. Oregon & California R. R. Co., 5 Fed. Rep. 523, 543.

Ladd vs. Foster, 31 Fed. Rep. 827, 832.

Holland vs. Brown, 35 Fed. Rep. 43, 48.

Howard vs. Delaware & H. Canal Co., 40 Fed. Rep. 195, 198.

Serensen vs. Northern Pacific Ry., 45 Fed. Rep. 407, 410.

Florida C. & P. R. R. Co., vs. Sullivan, 120 Fed. Rep. 799, 804.

Jacksonville Electric Co. vs. Bowden (Fla), 45 So. 755; 15 L. R. A. (N. S.) 451, 455, 456.

In the case first cited, the Supreme Court of Oregon said:

> "Under our statute, the measure of damages being the value of the life lost to the estate, not exceeding $5,000, which is represented by the probable accumulated net savings of the deceased, it necessarily follows that had he not been wrongfully killed he probably would have left to his estate the amount of such savings for distribution as by law provided."

In the case of Howard vs. Delaware & H. Canal Co., supra, suit was brought by an administrator under a statute of the beneficiary

type for damages sustained by collateral kindred of deceased, not dependent upon him for support and having no legal claim to support by him. There was no evidence in the case that deceased had accumulated any property prior to his death. The court, after holding that the measure of plaintiff's recovery was the loss sustained by deceased's estate, said:

> "In this case the deceased had accumulated nothing for anyone up to the time of his death in middle life. He was no more likely to accumulate property from then forward than before. The deprivation of his society, affection or counsel is not to be considered. The actual probable pecuniary loss is all that the statute covers and can be allowed for. Upon the evidence, considering all the probabilities of his future, no just ground for finding that he would ever have accumulated any property for his brothers and sisters is apparent."

In accordance with this holding the court directed the entry of a judgment in favor of plaintiff for only nominal damages.

The statement of the elements of damages to be considered under a statute which provides that the recovery shall be for the benefit of deceased's estate, in Holmes vs. Oregon &

California Ry. Co., supra, has been so often and so deservedly quoted as to justify repetition here:

> "The age, health, habits of industry and society, and mental and physical skill of the deceased, so far as they affect his capacity for rendering useful service to others, or acquiring property, must also be considered. Under the statute the life of the deceased is valued according to his capacity and disposition to be useful—to labor and to save. The industrious, provident and skilled are worth more to society than the indolent, improvident and ignorant, and their death is to be compensated for accordingly. This is the law; and, as will be seen, it makes no account of sentiment or feelings; and yet, while it is administered by fallible human beings, whether on the bench or in the jury-box, the chances are that a feeling of pity for the bereaved or indignation for the wrong will creep into the estimate and swell the damages beyond the strict legal limit."

Directly pertinent also is the following from Perham vs. Portland, etc., Co., supra:

> "Under Lord Campbell's Act, and similar

statutes, the damages recovered belong to the designated beneficiary, and are measured by the value of the life taken to the particular person entitled to the benefit of the statute, while under our statute they belong to the estate and are coextensive with the value of the life lost, without regard to its value to any particular person. In the one case the object of the action is to recover the pecuniary loss sustained by the designated relatives, and in the other the value of the life lost, measured, as nearly as can be, by the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life."

The mere fact that deceased might have become thrifty and accumulated property had his life not been cut short, does not justify the submission of the case to the jury, allowing it to guess what deceased's probable accumulations would have been under such circumstances. It was well said in Hutchins vs. Ry. Co., 44 Minn. 5, 10, in this regard:

"True, it is possible he might have become more thrifty in the future, but this was not at all probable in view of his age and past history. He might have met with some ex-

traordinary streak of good luck, such as discovering a valuable mine, or drawing a large prize in a lottery, but these conjectures are too speculative to form any legitimate basis for an estimate of damages."

Coming now to the evidence in the case, we find that the only facts proved upon the basis of which the jury was allowed to calculate and did calculate the probable loss to deceased's estate in prospective accumulations during the remainder of his life expectancy are (a) that deceased was about sixty-two years old at the time of his death (R., 99); (b) that his life expectancy was about 12.86 years (R., 77); (c) that he was earning $100 per month and keep of himself and wife (R., 101); and (d) that he did not drink or smoke (R., 98, 105). The record thus squarely presents this question of law:

In an action for death caused by wrongful act, does evidence showing that deceased was sixty-two years of age at the time of his death, that he was earning $100 per month and keep of himself and wife just before his death, and that he did not smoke or drink, furnish a basis from which a jury may reasonably and intelligently infer that he would have saved and added to his estate the sum of five thousand dollars during the 12.86 years of his life expectancy, in the absence of evidence showing a disposition on the part of the deceased to save or

accumulate property, and in the absence of evidence showing that he had in fact saved or accumulated a single dollar in his lifetime of sixty-two years?

Stripped of all surplusage, the bald question, which the record presents is:

Does a showing that deceased **earned** money warrant a finding that he would have **saved** money?

It is submitted that it thus clearly appears that, conceding the evidence makes out a **prima facie** case entitling plaintiff to an award of nominal damages, there is nothing in the record to warrant or sustain a substantial award of damages in favor of plaintiff. Obviously there was no obligation on defendant to prove that deceased was not of a saving disposition or that he had accumulated nothing up to the time of his death, since (a) the burden was on plaintiff to prove his entire case, one element of which was the damages sustained by deceased's estate and (b) evidence of deceased's past accumulations and habits of thrift, was peculiarly within the reach and knowledge of plaintiff but was not readily accessible to defendant.

In **In re California Navigation & Improvement Co.**, 110 Fed. Rep. 670, suit was brought,

under a statute of the beneficiary type, for the benefit of deceased's collateral kindred, who were not dependent upon him for support and maintenance. In view of this the measure of plaintiff's recovery was the loss sustained by deceased's estate. It was not shown that deceased was of a saving disposition or that he had accumulated anything. The court held (p. 677):

> "So here there is no evidence tending to show that Capt. Tukan was in the habit of saving his wages, or that his brothers and sisters had any reasonable expectation that he would ever give them or leave them or any of them anything of value. In this state of the evidence, the administrator of his estate would be entitled to recover nominal damages if the action was in a court of law, but in courts of admiralty nominal damages for personal torts are not awarded."

Shearman & Redfield, on Negligence (5th ed.), Vol. 2, Sec. 775, states the rule as follows:

> "But evidence of the age, health and habits of an adult decedent, not showing his earning capacity, nor expenditures, will not support a verdict for substantial damages."

It is submitted, therefore, that the maximum recovery to which plaintiff was entitled, under the evidence in the case, was nominal damages, and that the judgment below affirming the award of substantial damages should be reversed.

IV.

THE COURT BELOW ERRED IN HOLDING THAT DEFENDANT WAS BARRED OF ITS RIGHT TO COMPLAIN OF THE ERROR OF THE TRIAL COURT IN GIVING INSTRUCTION NUMBER TWELVE, BY ITS FAILURE TO ASK FOR AN INSTRUCTION ON THE MEASURE OF DAMAGES AT THE TRIAL.

The instruction complained of is as follows (R., 187-188):

"In determining the amount of damages to be awarded, if you find for the plaintiff, the jury may take into consideration the income and earning capacity of the deceased, his business capacity, experience and habits, his health, physical condition, energy and perseverance during what would have probably been his lifetime if he had not received the injuries from which death ensued. That is to say, the probable duration of the life of

the deceased, considering his age, it has to be considered in this behalf.

"I further charge you as a matter of law that the expectation of life for a man of sixty-two years of age, as laid down by the American Experience Table of Mortality, and this is founded upon experience of years, is 12.86 years."

The error in this instruction is that in effect it directs the jury to find for the plaintiff the amount deceased would have **earned** during the remaining 12.86 years of his life expectancy, whereas under the statute as construed in the Wilson case the jury should have been told to fix the plaintiff's damages at an amount equal to what deceased would probably have **saved** during that time. In a previous part of this brief it has been shown that the statute involved herein as construed by the territorial Supreme Court provides that the action is for the benefit of a decedent's estate and that, therefore the measure of a plaintiff's recovery must be the probable accumulations of the deceased during the remainder of his life expectancy. Instructing the jury to measure the plaintiff's damages by any other rule, as the court did in instruction number 12, was consequently a fatal error.

That instruction number 12 is erroneous is shown by comparing it with the instruction

given by the trial court in **De Amado vs. Friedman,** approved by the Supreme Court of Arizona, on appeal, 89 Pac. 588, 590. That instruction was as follows:

"I instruct you that if you should find that the defendant is guilty of the wrongful act, as charged in the complaint, and that the same resulted in the death of the child, Leo Friedman, then the plaintiff is entitled to recover in this case, for the benefit of the estate, such damages as the jury may deem from the evidence and proofs, as fair and just compensation therefor, not exceeding the amount claimed in the complaint, and in arriving at your verdict you should consider what pecuniary benefit the estate of said deceased would have derived, had said adobe wall not fallen upon him. You are to consider the probability of the said child living and growing to manhood and obtaining property, which the law, upon his death, if intestate, would have passed to his legal representatives; you are to consider the age and health of the child, his expectancy and probability of living and his mental and physical vigor and the probability of his accumulating property. You are to consider the damages that the said child's estate has sustained.

What you are to ascertain and by your verdict decide, if you come to the question, is what, according to the evidence, would have been the probable pecuniary benefit to the estate of the deceased from the continuance of his life. This you are not expected to determine with accuracy, as that would be impossible; but you are to fix according to your best judgment in the light of the evidence, what the amount would probably have been. Reasonable probability is all that can be expected in such a case. No arbitrary rule can be laid down. The elements which enter into the question of the value of a life to the estate of the deceased are so various that the matter must be left, under proper instructions from the court, to the sound discretion of the jury. The purpose of the statute under which the suit is brought is compensation. It is not the loss of the deceased, but the loss of the estate, which is to be estimated. The purpose of the statute is to make good to the heirs or representatives of the person killed that which they have probably lost by his death. To ascertain this it is of course necessary to take into view all the facts and circumstances which bear upon the question what his accumulations would prob-

ably have been. Among the questions proper to be considered in the light of the evidence are the following: Had the deceased, previous to his death, saved his earnings? Had he contributed to his mother's support? Was he a sober, industrious man, or was he habitually intemperate? Was he economical, or was he a spendthrift? From all the facts and circumstances, if he had lived, what sum, if any, would he probably have accumulated in the course of an ordinary lifetime, to be left to his heirs?"

The difference between the instructions cited and the instruction under consideration here is obvious. The former charge that **earning power minus expenses** is the measure of damages, the latter that **earning power alone** is the proper measure.

The rehearing in the court below was allowed in order that the sufficiency of instruction number 12 might be considered. In granting the rehearing, Justice Doan, speaking for the court, said:

"We would like to have counsel present arguments as to whether in stating the law relative to the measure of damages in an instruction that is correct so far as it goes

but that does not cover every feature of the law relative to the measure of damages constitutes reversible error where the opposing party at the time requests no further instruction on the subject and the additional question as to whether or not the instruction given in this case was in itself sufficient."

In reaffirming the judgment of the trial court after the argument on the rehearing, the court placed its decision on the ground that instruction number 12 stated the law correctly as far as it went, that if erroneous in any sense of the word it was so only in omitting to specify what habits of deceased should have been considered by the jury, and that this omission could not be complained of because defendant failed to request the trial court for more specific instructions on that point (R., 199). In other words, the court below held that the error in instruction number 12 was an error of non-direction and not of misdirection.

It is submitted, however, that the error in instruction number 12, though apparently one of non-direction only, is in reality an error of positive misdirection, for the elements omitted to be mentioned therein are so far of the essence of the true measure of damages under the statute as construed by the highest court of the territory as to make the rule as stated in the instruction under review positively erro-

neous. That the error in that instruction is not merely negative but is, in the last analysis affirmative, becomes the more obvious when it is considered in the light of the evidence adduced at the trial. This it is submitted is the light in which the correctness or erroneousness of the instruction must be considered, because it was in this light only that the instruction could have been viewed by the jury.

The jury was told in instruction number 12 that in assessing damages deceased's "habits" were to be taken into consideration. The only "habits" of deceased relative to which evidence was adduced was his absteminousness as to smoking and drinking (R., 98, 105). Consequently under the instruction of the court and the evidence in the case, the jury must have understood that it was directed to give the plaintiff substantial damages if it found that deceased did not drink or smoke, and the instruction under review must, therefore, be considered in effect to have so charged the jury. It has been pointed out heretofore that under the Arizona Act of 1901, as construed in the Wilson case, the plaintiff was entitled to recover an amount equal to the present value of deceased's probable accumulations during his life expectancy. The failure of the court to charge that deceased's habits of thrift and economy were the gauge of plaintiff's recovery was consequently not an omissive error,

but an error of positive misdirection.

That the jury was misled by the instruction as given follows from the fact that absolutely no evidence was adduced to show that deceased was of economical habits or had ever saved anything. Had the jury been instructed, as it should have been, that the measure of plaintiff's recovery was deceased's probable accumulations during his life expectancy determined in the light of deceased's habits of thrift and economy and his past accumulations it would have been impossible for the jury to find, on the evidence in the case, more than nominal damages for the plaintiff. The verdict of the jury awarding substantial damages to the plaintiff is conclusive proof that instruction number 12 did in fact mislead the jury. Moreover, from an examination of the record it is fair to say that the trial court would in all likelihood have refused to grant an instruction directing the jury to fix damages on the theory outlined above, and thus to correct the instruction complained of, had defendant requested an instruction drafted on that theory. This follows from the fact that the trial court felt justified in submitting the case to the jury under instructions for the award of substantial damages, even though there was no evidence as to deceased's past accumulations and as to his habits of thrift and economy. Therefore even conceding the error in instruction number

12 to be one of omission merely, nevertheless, since it appears that the jury was misled thereby and that the court would have refused to grant an instruction correcting the error in the instruction herein involved, the giving of the latter instruction was erroneous. 11 Encyc. Pl. & Pr., 224, 227.

There are many cases in which the failure to make an instruction sufficiently comprehensive has been held to be a positive misdirection of the jury. It has been so held in cases where as here, the omission is such as to render the instruction as given positively erroneous. For example, in **Ward vs. Cochran,** 150 U. S. 597, 609-610, the trial court gave an instruction, purporting to cover the elements necessary to constitute adverse possession, in which it omitted to mention the elements of actuality and exclusiveness. This court held the instruction to be affirmatively erroneous, notwithstanding the fact that a previous instruction stated the law on this point correctly, and the case was accordingly reversed.

In **Houston, etc., Ry. Co. vs. Johnson,** 27 Tex. Civ. App. 420; 66 S. W. 72, 74, the trial court, apparently intending to instruct the jury to assess damages at an amount equal to the money value, to the plaintiff, of the life of deceased, inadvertantly omitted the words, "to the plaintiff." This omission was held to ren-

der the instruction as given positively erroneous and hence to constitute reversible error.

In **International & G. N. Ry. Co. vs. McVey,** 99 Tex. 28; 81 S. W. 991, 999; 87 S. W. 328; the following instruction was reviewed:

> "If you find from the evidence and under the charges of the court for the plaintiffs you will assess their recovery of damages at such amount as if paid now will fully compensate them for the actual damages, if any, sustained by them as shown by the evidence and such as is fairly proportioned to the injury sustained, if any; but you will not allow the plaintiffs anything by way of solace for the death of the said Edward McVey or for any sorrow or anguish suffered by them as the result of such death."

The Court of Civil Appeals sustained the charge, saying in part (81 S. W. 991, 999):

> "The charge of the trial court on the measure of damages as complained of in assignment of error 14 was substantially correct. If it was incomplete and not as full as desired a special instruction should have been requested."

The Supreme Court of Texas, however, held the instruction misdirected the jury, and therefore reversed the case. The court said (99 Tex. 28; 87 S. W. 328):

> "This instruction as we construe it means merely to exclude a recovery by the plaintiffs of any compensation for grief caused by the death of the husband and father. It does not exclude compensation for the loss of the society or companionship of the deceased, which in the opinion of some, if not all, of the jurors, may have constituted the most serious injury to the wife at least. * * * 'The mention of one thing is the exclusion of another' is a rule in the construction or written instruments. It is no less a rule of common sense and one which suggests itself to the ordinary mind when construing language spoken or written to which it is applicable."

The parallel between the situations presented in the cases cited and that presented herein is so obvious as not to require extended comment.

Instruction number 12 purports to give to the jury a summary of the characteristics of deceased to be considered in computing the damages recoverable. It contains a good sum-

mary of those characteristics that tended to **enhance** the amount of recovery, in case the jury should find for the plaintiff, but omits to mention such as tended to **reduce** the amount of recovery. In **Evans vs. George**, 80 Ill. 51, 54, the Supreme Court of Illinois disposed of a similar instruction as follows:

> "In the last instruction of the series the court undertook to give to the jury a summary of the principal facts which they were to consider in their deliberations. It directed their attention only to facts favorable to defendant and left out of view all that tended to illustrate plaintiff's theory of the case. It is the duty of the jury to consider all the facts and when the court assumes to direct their attention to the facts it should refer them to all the facts so as to present the case fairly for both parties. Otherwise the jury might understand the facts stated in the instructions are the only ones necessary to be considered in deliberating on their verdict. (Citing Chicago, etc., Ry. Co. vs. Griffin, 68 Ill. 499, where a similar instruction is characterized as highly prejudicial and misleading.) The judgment will be reversed and the case remanded."

ADDENDA.

(To be inserted at the bottom of page 66.)

That the instruction under review is positively erroneous, and not merely omissively so, appears further from the last sentence thereof, which reads (R., 187-188):

> "I further charge you as a matter of law that the expectation of life for a man of sixty-two years of age, as laid down by the American Experience Table of Mortality, and this is founded upon experience of years, is 12.86 years."

This charge made it imperative for the jury to find that deceased would have lived for the period stated but for his death by reason of defendant's negligence. It is true that in the previous part of this instruction the jury were told to find "what would have probably been his (deceased's) lifetime if he had not received the injuries from which death ensued," and to estimate "the probable duration of the life of the deceased." In the sentence above quoted, however, the court undertook to say "as a matter of law" what deceased's life expectancy was, and hence withdrew that question entirely from the jury's consideration. The jury were bound to accept the figures given them by the court and could not consider the bearing of deceased's physical condition and health upon his chances of life. This was clearly prejudicial to defendant company, for the record shows that at the time of the accident, and for many years previous thereto, deceased was not in sound health (R., 86, 88, 122-148). Had the jury been allowed to consider these facts they might very well have found that the probable duration of deceased's life was not 12.86 years, and this would have had direct bearing upon the amount of the recovery. In the case of *Vicksburg and Meridian Railroad Company vs. Putnam*, 118 U. S., 545, the plaintiff, a passenger on defendant's road, sued for personal injuries impairing his earning capacity. Standard life and

annuity tables were introduced to prove plaintiff's probable duration of life. The jury were instructed, in effect, that the plaintiff's life expectancy was to be determined by reference to those tables alone. This court, holding the instruction to be reversible error, said (pp. 556-557):

> "The natural, if not the necessary, effect of these peremptory instructions at the beginning and end of dealing with this matter would be to lead the jury to understand that they must accept the tables as affording the rule for the principal elements of their computation, and to create an impression on their minds, which would not be removed by the incidental observation of the judge, when speaking of the possibility of the plaintiff's getting well—'This is only one mode of arriving at it;' especially, as it was nowhere, throughout the charge, suggested to the jury that they would be at liberty, if they found difficulty in following the mathematical rules prescribed to them, to estimate the loss of income according to their own judgment.
>
> "Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what the jury in this case had to consider was the probable duration of this plaintiff's life, and of the injury to his capacity to earn his livelihood. Upon the evidence before them, it was a controverted question whether that injury would be temporary or permanent. The instruction excepted to, either taken by itself or in connection with the whole charge, tended to mislead the jury, by obliging them to ascertain the average injury to the plaintiff's capacity by the year, whether the extent of that injury would be constant or varying; and by giving them to understand that the tables were not merely competent evidence of the average duration of human life, and of the present value of life annuities, but furnished absolute rules which the law required them to apply in estimating the probable duration of the plaintiff's life, and the extent of the injury which he had suffered."

The case cited demonstrates the affirmative error in the instruction under review.

TORN PAGE

The holding of the court below that defendant was barred of its right to complain of the error committed by the trial court in giving instruction number 12 was based upon the ground (a) that the error was one of omission and (b) that defendant waived its right to object thereto by failing to request more detailed instructions on the question of damages. It has been shown that the error in the instruction complained of was really one of misdirection and not of non-direction merely. It remains to consider whether or not defendant had an opportunity in the trial court to request the instruction which the court below held he should have requested.

This discussion may be subdivided into two parts: 1. Did defendant waive its right to take advantage of the error in instruction number 12 by failing to offer a proper instruction before it knew that instruction number 12 would be given? 2. Did defendant waive its right to take advantage of the error in instruction number 12 by failing to offer a proper instruction after it knew that instruction number 12 would be given?

1. If instruction number 12 had been omitted entirely there would have been no error on the ground now complained of. It would have been proper to instruct the jury to assess the plaintiff's damages at such a sum, not exceed-

ing $5,000, as would fairly compensate deceased's estate for the loss sustained by his death. Hence instruction number 12 is resposible for the error introduced into this aspect of the case. Surely defendant could not and was not bound to anticipate the error; and if that is so it must equally be true that defendant cannot be said to have waived any right by failing to request a proper instruction in advance of the giving of the erroneous instruction here complained of.

2. The record does not disclose just when defendant first learned that instruction number 12 was to be given, and it must therefore be presumed that defendant ascertained that fact at the earliest time defendant had a legal right to know of it. Inasmuch as there is nothing in the Arizona statutes or rules of practice requiring a trial court to submit proposed instructions to the parties for inspection, defendant could not have known that instruction number 12 would be given until it was read to the jury. It was then too late for defendant to offer a proper instruction correcting the error in instruction number 12. R. S. Arizona, 1901, paragraph 1049, provide:

> "Either party may before the charge is given present to the court in writing such instructions as he desires to have given to the jury, and for this purpose a reasonable time

therefor shall be given; the court shall pass on the same and either give or refuse the same as asked; if given, the judge shall on the margin of each instruction write the word 'given' in ink and sign his name thereto in ink, and if refused he shall in like manner write the word 'refused' and sign his name thereto."

Under the provisions of the law an instruction offered after the charge to the jury is begun plainly comes too late.

It is submitted, therefore, that defendant cannot properly be held to have waived its right to object to the error in instruction number 12, especially in view of the following provisions of Section 15, chapter 74, Laws of Arizona, 1907:

"The giving, refusing, or modifying of instructions and every part of charge given to the jury and all rulings, orders and actions of the court in a case shall be deemed excepted to without formal exception and subject to revision by the Supreme Court for error without bill of exceptions."

It has been pointed out heretofore that the verdict shows that the jury must have been misled by the instruction here involved. But

even were this not clearly apparent from the record in the case the presumption will be indulged that defendant was prejudiced by the giving of the instruction complained of, on the general principle that where error is shown to exist injury will be presumed unless the contrary clearly appears. In **Vicksburg & Meridian Railroad vs. O'Brien,** 119 U. S. 99, 103, this court stated the applicable rule as follows:

> "While the court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not, and could not, have prejudiced the rights of the party."

V.

THE COURT BELOW ERRED IN HOLDING THAT THE TRIAL COURT PROPERLY OVERRULED DEFENDANT'SOBJECTIONS TOINTERROGATORIES NUMBERS 11 AND 12 PROPOUNDED TO DR. O. E. PLATH AND DR. E. PAYNE PALMER.

The interrogatories in question are as follows (R., 70-71, 74-75):

"Interrogatory 11. Doctor, assumed that the body identified as that of George W. Sanders, deceased, on which this post mortem examination was held, was a man 60 years of age, strong and healthy for a man of his years, whose duties at the Vulture mine, 16 miles from Wickenburg, for several years immediately preceding an accident and injury later stated, require of him, besides overseeing and directing the manual labor, the keeping of the books the lifting of pans and settling basins about the cyanide plant, going about all over the mines and buildings, down through the mines through inclines to a depth of 450 feet, the climbing 200 feet and more perpendicular ladders, through tunnels and levels over ore piles, while superintending the work; takes part in timbering and all kinds of carpenter work about the mines, fires the engine, sharpens tools, shoes the horses and does other blacksmithing required about the mines; goes back and forth from Wickenburg with loaded teams and discharges the loads; carries water in five gallon pail 500 feet for domestic purposes, and windlasses ore from shafts—a man who for many years prior to and up to the 20th March, 1902, had engaged in man-

ual labor of various kinds and all of which labor and duties he performed without apparent fatigue, his weight about 200 lbs.

"While riding upon the front lateral seat of the open part of an electric street car in Phoenix, sitting beside a man traveling with him on the same seat, on the 20th March, 1902, the car enters a curve in the track where it turns into another street while running 10 miles or more per hour, the two men are thrown into the air and come to the ground in a mixup 15 feet from the car, deceased falling upon his back and the other man falling upon him; as soon as able to speak he complains of injury of the hip and chest; the same night he spat blood; the next day he was black and blue over his chest and hip, suffered continuous pain and expressed fear of internal injury. The next day, 22nd, accompanied by the man who was thrown with him, he returned to Wickenburg, thence by team to the Vulture mine. His left arm is lame, breast over the heart bruised and discolored which continued long after discoloration from bruises on other parts of his body had disappeared; he complains of internal pain at the waist line at

the side of the navel; has heart palpitation, spat blood and vomited clots of blood; the next day, 23rd March, he drives to Wickenburg in the afternoon and next morning returns to camp where he required assistance to help him from the conveyance to his house and immediately takes to his bed; is suffering from pain about his heart, at the waist line and shoulder, and from suffocation; was confined to his bed two weeks and on getting up and out it is discovered that physical exertion brings on heart palpitation, choking suffocation and if persisted in produces vomiting.

"During the month of April following the accident he went into the mine and not returning as soon as expected a man is sent who finds him leaning against the wall of an incline tunnel, exhausted and helpless and with the assistance of another the two brought him out and to the house, after which he was not permitted to go alone. He can no longer perform labor as before the accident because of exertion producing palpitation of the heart, choking and suffocation; the bed chamber of himself and wife is changed to downstairs because the climbing

of the stairs produces palpitation; his sleep when lying down is often interrupted by choking and suffocation and is relieved only by his wife, at times others assisting her, raising him to a sitting position; the driving of a team from camp to Wickenburg or back so exhausts him at times that he is required to go to bed for hours and requires the administration of restoratives before he can get about again.

"The patient grows worse as time passes, the character of his symptoms and suffering being the same but more aggravated and is produced with less exertion as time passes. For some time strychnine and other drugs seem to control the heart action so that the patient can do things not requiring much exertion, but drugs finally fail to have the effect of quieting palpitation; he gradually grows worse until December, 1903, his limbs and feet begin to swell and continue to swell and grow worse until his death on the 6th day of February, 1904, the palpitation, suffocation, choking and vomiting coming on soon after the accident and continued down to his death, becoming more violent and frequent as time passes until the end; he was 62 years of age when he died.

"These facts assumed, Doctor, what, in your opinion, was the probable originating cause of death? And in giving your answer please disregard the anatomical conditions disclosed by the post mortem examination."

"Interrogatory 12. Doctor, again assuming as facts the history, and case as stated in the last interrogatory, and in addition thereto the anatomical condition of the body and organs of the deceased as disclosed to you by the post mortem examination, to what probable proximate cause would you attribute death?"

To these questions the physicians answered that the injuries received in the street railway accident were the probable originating causes of death. These answers constitute the only testimony in the case tending directly to show that Sanders' death was the proximate result of injuries sustained in falling or being thrown from defendant's car. That the ruling of the court allowing these questions to be answered was prejudicial to defendant becomes apparent when it is remembered (a) that deceased died twenty-three months after the street car accident in which he was injured and that the real issue in the case is, was the death due to the accident, or to other causes, and (b) that the

hypothetical questions complained of were propounded to the witnesses in depositions, and therefore defendant had no opportunity to cross-examine the witnesses after it appeared that plaintiff's evidence did not sustain the facts assumed in the questions.

The court below sustained the ruling of the trial court allowing the answering of the hypothetical questions on these two grounds: (1) that the abstract of record filed with the court merely stated that the answers were received "over the objections of counsel for the defendant" and the court would not, under its rules, scrutinize the reporter's transcript to see what the specific objections interposed were; and (2) that even conceding that the brief of defendant set out the grounds of objection as made in the trial court, the ruling of the trial court was correct.

I. The rule relied on as justifying a refusal to examine the reporter's transcript for the purpose of discovering the specific objections made in the trial court is as follows:

> "'The abstracts of record, as filed, will be treated by the court as containing such portions of the record as the parties deem sufficient upon which to try the assignments of error.' Sub. VI, Rule I, 8 Ariz., iv; 71 Pac., vi."

Subsequent to the promulgation of this rule but before this case was heard in the Supreme Court of Arizona, an act was passed by the 24th Legislative Assembly of Arizona—see Laws of 1907, p. 125—requiring the reporter's transcript to be filed with the Clerk of the Supreme Court and making it part of the record in the case. It is submitted that the refusal of the court to examine the reporter's transcript was in violation of the act of 1907. Furthermore, the Supreme Court of Arizona is in the habit of referring to the reporter's transcript for enlightenment on any point that is not made clear by the abstract.

Leatherwood vs. Richardson, 11 Ariz. 278-280; 94 Pac. 1110-1112.

Copperbelle Mining Co. vs. Costello, 11 Ariz. 334-350; 95 Pac. 94-101.

In the latter case the court said:

"The evidence was material, if it showed the existence of the debts at the time of the execution of the note and mortgage. **An examination of the reporter's transcript** shows that in ruling upon the objection the court said: 'I can't admit it in evidence, unless there is something in it or to it whereby we can determine how much of it existed on January

9th, and how much accrued afterwards. You present me a list of accounts in 1903, without any distinguishing marks on them. They do not prove anything.' The evidence offered, therefore, if competent, seems to have been immaterial, as not tending to prove any indebtedness at the time of the execution of the mortgage."

Under the acts of 1901, therefore, and under its own practice, as well, the court should have examined the reporter's transcript to discover the specific objection made by defendant in the trial court.

2. The questions objected to were asked of three different physicians (Foss—R., 64-65; Plath—R., 70-71; Palmer—R., 74, 75.) The answer of Dr. Foss was not admitted (R., 117-118), but the answers of Dr. Plath and Dr. Palmer were (R., 166-167). The objections made in the trial court to the hypothetical questions in controversy are (A) that the questions in effect ask of the witnesses what the jury's verdict should be, and (B) that the questions assume facts not shown by the evidence (R., 115-118, 165-167).

A.

As has been pointed out practically all of defendant's evidence was directed to show that

deceased's death was not the proximate consequence of the injuries received in the street car accident, but was caused by chronic endocarditis from which deceased suffered long before he received those injuries. The questions objected to assumed a given state of facts and then asked the witnesses to state their opinions as to "the probable originating cause of death." This was the very issue to be determined by the jury and in effect made the witnesses members of the jury. The questions were for this reason improper and prejudicial to defendant.

Davis vs. Tarvelers Ins. Co. (Kansas), 52 Pac. 67.

Pelamourges vs. Clark, 9 Ia. 1.

Betts vs. Betts, 113 Ia. 111; 84 N. W. 975.

Briggs vs. Minneapolis St. Ry. Co. (Minn.), 53 N. W. 1019, 1020.

In the case last cited, the facts were closely analagous to those of the instant case. The action was, as here, for death by wrongful act. The real issue in the case was as to whether or not the death was the proximate result of the acts of defendant's servant. The hypothetical question involved in the case assumed a given state of facts and called for the opinion of the expert witness as to the probable cause of deceased's death. The court, in holding the question improper, said:

"The matter inquired of was not under the circumstances the subject of expert evidence but was the ultimate fact to be determined by the jury. It was entirely proper to inquire of these experts the probable effect of excitement or physical exertion upon one in deceased's condition, but we never knew of a case, and have not been referred to any, where it was ever permitted to repeat to a witness all the evidence in the case, and then ask him what verdict, in his opinion, ought to be rendered in the case, which was in effect what was sought to be done in this instance."

B.

The second objection to the hypothetical questions in issue is that they assumed facts not fairly within the scope of the evidence. That the question is subject to this objection will appear from the following quotations from the questions as compared with the extracts from the evidence upon which they were based:

Statement in the question:

"Carries water in five-gallon pails five hundred feet for domestic purposes."

The only evidence on which the above statement could be based is that of Frank DeMassey (R., 33)) as follows:

> "Before he was hurt he carried the water from the kitchen to the office and living rooms some two hundred feet distant. He also carried the distilled water from the mill to the house for domestic use some four hundred or five hundred feet."

Nowhere is there any suggestion that the water was carried in five gallon pails.

Statement in the question:

> "And windlasses ore from shafts."

The only testimony on which this statement could be based is that of J. M. Jamison (R., 202). Mr. Jamison said:

> "He was there windlassing."

Nowhere is there any suggestion that he windlassed ore from the shafts.

Statement in the question:

> "A man who for many years prior to and up to the 20th of March, 1902, had engaged in manual labor of various kinds and all of

which labor and duties he performed without apparent fatigue."

There is evidence showing that he performed many kinds of manual labor without apparent fatigue while employed at the Vulture Mine. He first engaged in employment at this mine in the year 1898 (McKee, R., 58). The witness, George E. Sanders, in answer to the question, "In what business and where was deceased engaged prior to his engaging with the New Vulture Mining Company, and when did he so engage with said Company, if he did?" testified "He was following his profession as a mining engineer and was receiver for the Casa Grande Valley Canal Company, which had about forty miles of canal, head-gates and a reservoir, besides laterals and ditches, which required inspection and new work continually, besides the adjustment of a large number of accounts and making new contracts, all of which he personally attended to. He lived in Florence and Tucson. He engaged with the New Vulture Mining Company in 1898." (R.,39.)

It is thus plain that the evidence showing that he engaged in manual labor without apparent fatigue covered only a period of four years while the question assumes that he was engaged in that kind of labor during practically the whole of his life.

Statement in the question:

"The two men are thrown into the air and come to the ground in a mix-up fifteen feet from the car, the deceased falling upon his back and the other man falling upon him."

The testimony upon which this is based is as follows:

McKee (R., 55-56) testified: "As stated before, Mr. Sanders and myself were thrown from the car a distance of some eighteen or twenty feet—thrown headlong and with great violence. Mr. Sanders and myself were thrown from the car at the same time, being thrown headlong and going at such a rate of speed that caused us to be thrown such a distance it is difficult to explain how we alighted. My impression is that Mr. Sanders was thrown on top and over me when we fell."

George E. Sanders (R., 37-38) testified:

"Mr. McKee and father went into the air and made a somersault, as it seemed to me, and both landed fifteen or twenty feet from the car in a mix-up; one coming down on the other, I think father falling under. My father struck the ground at a point at least fif-

teen feet from the point at which he was thrown from the car. After turning a somersault he landed on his back with his head nearest the track. I saw Mr. McKee thrown from a sitting position beside my father. My father by being on the front end was first thrown and landed first, Mr. McKee immediately following."

Statement in the question:

"The next day he was black and blue over the chest and hip, suffering continuous pain and expressed fear of internal injury."

There is no testimony of any kind to sustain this statement.

Statement in the question:

"The next day, the 22nd, he returned to Wickenburg, thence by team to the Vulture Mine. His left arm is lame, breast over the heart is bruised and discolored which continued long after discoloration from bruises on other parts of his body had disappeared; he complains of internal pain at the waist line at the side of the navel; has heart palpitation, spat blood and vomited clots of blood."

All this is not in accord with the evidence, as will appear from the following:

Dr. Ward testified as follows (R., 79):

"My books and records are all in Phoenix and I do not remember the dates accurately; but along about the month of April, 1902, Mr. Sanders came to my office and said that about two weeks previously, as I remember it, he had been thrown from a street car in Phoenix. I treated him at that time. He was suffering from extreme pain in the chest and had some discoloration on his shoulder. He had difficulty in breathing, and a stiffness and soreness of the muscles. Also, his heart was enlarged and dilated."

And J. M. Jamison testified (R., 103):

"That night he vomited some, and he spat some blood and vomited up some clots of blood that night."

Nowhere is there any suggestion that he spit blood or vomited clots of blood on the following day and nowhere is there any suggestion that his chest was bruised and discolored on the following day, and the only evidence on

the subject is directly in conflict with the statement that his chest remained discolored long after the discoloration on the other parts of his body had disappeared. Nowhere is there any suggestion that on the day after the accident he complained of internal pain at the waist line or had heart palpitation.

Statement in the question:

"The next day, the 23rd of March, he drives to Wickenburg in the afternoon and next afternoon returned to camp where he required assistance to help him from the conveyance to the house and immediatly takes to his bed. He is suffering from pain about his heart at the waist line and shoulder, and from suffocation."

There is no evidence whatever showing that he required assistance to help him from the conveyance to the house, nor is there any evidence of his suffering from pain about the heart at the waist line and shoulder.

Frank DeMassey (R., 32) testified:

"Mr. Sanders drove Mr. McKee to Wickenburg and returned to camp next morning; he was completely fagged out and went to bed at once. He was still sore, lame and suf-

fering from suffocation, and complained of difficulty in breathing."

Statement in the question:

"For some time strychnine and other drugs seem to control the heart action so that the patient can do things not requiring much exertion, but drugs finally fail to have the effect of quieting the palpitation."

Mr. Jamison, who was not qualified as a medical man, testified (R., 105):

"He used strychnine for a time * * * After a time that failed to have any effect on him."

Dr. R. Sylvanus Slusher testified (R., 51): The patient improved in a fairly satisfactory manner during the first two or three months of my treatment. * * * However, as time went on the heart seemed to fail to respond to treatment."

That the variations between the facts assumed by the question and the evidence as above shown are so great as to make it absolutely improper for the answer to the question to be admitted in evidence, is clear beyond all question.

Lawson, Expert Evidence, 153.

Wigmore, Evidence, Sec. 682.

Davis vs. Travelers Ins. Co. (Kansas), 52 Pac. 67, 68.

Greeno vs. Roark (Kansas), 56 Pac. 329.

Maynard vs. Oregon R. Co. (Oregon), 72 Pac. 590, 594.

Butler vs. Phillips (Colo.), 88 Pac. 480, 484.

Bouvier vs. Brass (Ariz.), 100 Pac. 799, 800-801.

Lawson states the rule as follows:

"An expert cannot give an opinion on a hypothetical statement which is not supported by the facts as brought out at the trial. There must be evidence tending to prove the matters stated in a hypothetical case, to render it proper. But some latitude must necessarily be given in the examination of medical experts, and in the propounding of hypothetical questions for their opinions, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert and if the facts are found by the jury, as the counsel, by his question, assumes them to be, the opinion may have some weight; otherwise

not. It is the privilege of the counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justified, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purpose of the question, and for no other purpose. If the facts stated in hypothetical cases are not proved, the opinion, of course, goes for nothing."

Plaintiff's case depends almost entirely upon the answers of the physicians to the hypothetical questions. As it is impossible to tell what those answers would have been if the facts assumed in the questions had been confined to the evidence in the case it follows that there is no evidence to sustain the verdict.

The transcript of record shows that objections to the said improper question were duly and seasonably interposed. The question was first gone over in detail when the deposition of Dr. Foss was under consideration (R., 115-117), where defendant pointed out in detail the matters covered by the question, which were not included in the evidence, but its objections were overruled (R., 117).

The objections were renewed when the deposition of Dr. Plath was under consideration

(R., 119), and the court hesitated and took the matter under consideration (R., 119-120). When the matter was brought up again defendant renewed its objections (R., 165-167), but they were again overruled by the court (R., 166).

When the deposition of Dr. Palmer was under consideration, defendant simply stipulated that the record should show the same objections (R., 167).

Plaintiff in error submits that the errors in the decision of the court below are such as to require the reversal of the judgment of that court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1913

No. 61.

PHOENIX RAILWAY COMPANY, Plaintiff in Error

vs.

LEE H. LANDIS, Administrator of the Estate of George W. Sanders, Deceased.

In Error to the Supreme Court of the Territory of Arizona.

J. M. JAMISON,
Attorney for Defendant in Error.

JOHN MASON ROSS,
Of Counsel.

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Railroad Co. v. Hawkins, 174 Fed. 597, Br. pp. 8, 15
Robinson & Co. v. Belt, 187 U. S. 41, 50, Br. p. 25

Seresen v. Northern Pac. Co. 45 Fed. 407, Br. p. 14
Sharon v. Winnebago Furn. M. Co. 124 N. W. 299 (Wis. '10), Br. p. 19
Shawnee Gas & Elec. Co. Hunt, 122 Pac. 673 (Okla. 1912), Br. p. 46
So. Pac. Co. v. Wilson, 10 Ariz., 162, Br. p. 5, 12
Standlee v. St. Louis etc. Ry. Co., 25 Tex. Civ. App. 340, Br. p. 17

Texas etc. R. Co. v. Volk, 151, U. S. 73, Br. p. 18
Thomas v. Speese, 132 Pac. 1137, Br. p. 25
Turner v. Railroad Co., 40 W. Va. 597, Br. p. 8

Union Traction Co. v. Roberts, 229 Ill. 489, Br. p. 46

Ward v. Cochran, 150 U. S. 597, Br. p. 20
Warren etc. R. Co. v. Waldorp, 126 S. W. 792 (Ark. '09), Br. p. 19
Wells v. Swift & Co., 133 Pac. 739 (Aug. '13), Br. p. 45
1 Wigmore on Ev. Sec. 672, Br. p. 46

Yergy v. Helena Light & Elec. Co., 102 Pac. 320 (Wash. '09), Br. p. 11

IN THE

SUPREME COURT OF THE UNITED STATES

———o———

OCTOBER TERM, 1913

———o———

No. .....

———o———

PHOENIX RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

LEE H. LANDIS, ADMINISTRATOR OF THE ESTATE OF GEORGE W. SANDERS, DECEASED.

———o———

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA

———o———

BRIEF FOR DEFENDANT IN ERROR

———o———

Appellee's intestate was injured March 20, 1902, and died February 6, 1904. This action was commenced March 18, 1904. Numerous postponements and continuances, and a change of venue at plaintiff's instance, delayed the trial until May 22, 1908 (R. 3-22).

The case was tried to a jury which returned a verdict in favor of defendant in error in the sum of $5,000.00, being the statutory limit of recovery in such an action under the laws of the Territory of Arizona (Par. 2766, R. S. 1901). The evidence would have

supported a much greater recovery, but the statutory limitation prevented.

An appeal was taken by defendant to the Supreme Court of the Territory of Arizona, which court, on April 2, 1910, affirmed the judgment appealed from (13 Ariz. 80; 108 Pac. 247). A rehearing was granted upon application of plaintiff in error, and on January 16, 1911, (13 Ariz. 279; 112 Pac. 844), the former decision of the court was reaffirmed. Appeal was then taken to this court and after the lapse of five years since the rendition of the judgment appealed from and nearly ten years since the suit was filed, the case comes on for a hearing.

We freely concede the right of plaintiff in error to contest this judgment. We make no criticism of the law's delays in so far as they are necessary to the correct determination of causes. The relative insignificance of the amount involved does not render any cause beneath the dignity of this great court, but we submit that, in excuse of the delays, plaintiff in error has interposed to the collection of the judgment appealed from, it should now appear that there is no frivolity in this appeal, and that the errors assigned are substantial and fairly arguable. We invite the court's attention to these alleged errors, considering them in the order of plaintiff's presentation.

The first four and a part of the fifth page of appellant's brief is devoted to a "Statement," portions of which we feel should have some consideration from us because of the manner in which appellant has treated matter in this connection, presenting appellant's side in the most favorable light and appellee's most unfavorably, which we will point out.

It is true, as stated at the bottom of page 2 that "The plaintiff's evidence was based upon the theory that the decedent's death was the proximate consequence of defendant's allged negligence." In this connection we challenge the attention of the court to the record from which it will appear that defendant

in the trial court introduced no testimony whatever to the effect that the defendant was not guilty of the negligence charged and proven by plaintiff, nor did defendant introduce any evidence whatever in any attempt to show that deceased was guilty of contributory negligence.

It is true, as stated (Br. 3), that the defendant's evidence was directed to show that prior to the accident the deceased was suffering from severe internal disabilities, "which of themselves were sufficient to have produced his death," and that in support thereof introduced copies of declarations of deceased made in applications for increase of pension in which it was stated that he was suffering from disease of the lungs. Upon this application for increase it appears by the evidence of Dr. Foss (R. 66), the Chief Government Examiner, that the examination was made on the 3rd day of June, 1903, and he proceeds to describe the condition of the applicant and reported to the Pension Department the findings of the Board of Examiners upon this application. During this examination the applicant stated that the condition of the heart discovered by the examiners had existed since the 20th day of March the previous year (1902), and that the examiners found disabilities, and reported as a result of such examination a disability of seventeen-eighteenths on account of the heart, but denied any rating for increase of pension on account of the lungs.

The witness, Foss, further testified (R. 69), in answer to cross interrogatory 17, that the post-mortem examination did not disclose diseased lungs. There was a general adematous (dropsical) condition of the entire system, a result which follows dilation; and in answer to cross interrogatory 6 (R. 67) the same witness testified that, "The examination did disclose a difference from that of another heart dilated from fatty degeneration without history, in that, there was a scar caused by traumatism or injury causing lesion and indicating quite clearly that there had been an injury." And in answer to direct interrogatory 26

(R.63), the witness basing his answer upon the post-mortem examination stated that, "The immediate cause of death was dilation of the heart." Drs. Plath and Palmer were present and assisted in the post-mortem. In answer to interrogatory 9, based upon the post-mortem examination (R. 69-70), the witness testified that, "The immediate cause of death was acute dilation of the heart," and Dr. Palmer (R.73) answering the same question, "I attribute the immediate cause of death to acute dilation of the right side of the heart." Dr. Duffield, a witness for the defense, testified that endocarditis is an inflammation of the lining of the heart; that it would result quickly, "If your rupture does not immediately kill."

"Q. Then endocarditis, if I understand your position, would follow a rupture?"

"A. Yes. (R.134)."

This witness also testified that where a heart had been ruptured that hypertrophy was a healthy condition and was a process of repair of dilation, nature throwing out sort of ties, causing bands and a thickening, and that upon a post-mortem these bands and the scar would be disclosed to the examiner's eye as well as the new tissue (R. 139), and that in a case of traumatic injury followed by lesion of the heart, if the post mortem discloses the scars and bands, "it is fair to assume it is due to that." (R. 140).

So it was an issue of fact in the case whether, as claimed by the plaintiff upon the trial, death resulted as the proximate cause of the injuries received in the accident, or was the result of an alleged chronic trouble which existed prior to the accident, as claimed by the defendant. On this issue and this alone the defense to a recovery was made. The other material issues were not controverted. The jury found this one controverted issue against the defendant, there being no controversy as to the other issues made by the complaint the jury found all issues in behalf of the plaintiff.

I

THAT PLAINTIFF IN THE TRIAL COURT SHOULD HAVE ALLEGED AND PROVED THE EXISTENCE OF BENEFICIARIES OF THE ESTATE OF DECEASED.

Plaintiff in error now complains of the construction of an Arizona statute by the Arizona Supreme Court. It admits that in the case at bar and in two other decisions that court has held that under the Arizona statutes governing cases of this character it is unnecessary to allege or prove the existence of beneficiaries.

Southern Pac. Co. v. Wilson, 10 Ariz., 162;

85 Pac. 401.

De Amado v. Friedman, 11 Ariz., 56; 89 Pac. 588.

The rule laid down by the Wilson case in 1906 was reaffirmed in the case at bar. The Wilson case, as will be noted upon examination, was most carefully considered. In the case at bar the correctness of the decision in the Wilson case was challenged by plaintiff in error, but was re-affirmed by the territorial supreme court in the following language:

> "This contention of appellant has been disposed of by us in Southern Pacific Co. v. Wilson, and again in DeAmado v. Friedman; and we see no reason, in the light of appellant's discussion, to recede from the views we have hertofore expressed."

The identical contention thus disposed of is now addressed to this court, and solely involves the interpretation of an Arizona statute. Plaintiff in error concedes that this court will ordinarily follow the decision of the Supreme Court of a territory on matters of local statutory construction. This rule has been frequently announced.

Copper Queen Cons. M. Co. v. Arizona, 206 U. S. 474, 479; 51 L. Ed. 1143, 1146.

English v. Arizona, 214 U. S. 359, 363; 53 L.Ed 1030, 1033.

Clason v. Matko, 223 U. S. 646, 653; 56 L.Ed. 588, 593.

But plaintiff in error, argues that,

> "The consequences of following the construction thereof adopted by the Supreme Court of Arizona, are such as to justify this court in rejecting that construction" (Br. 27).

Appellant does not indicate what these consequences are, excepting that in a case where there are no next of kin, an estate might recover damages which would not be subject to decedent's debts or to the law of escheat. (Br. 25.) These questions do not demand consideration until involved in a presented case, but in connection with plaintiff's theory of escheat (Br. 25) it is worthy of note that paragraph 2765 R. S., Arizona, 1901, provides,

> "and the amount recovered in every such action shall be distributed to the parties, and in the proportions provided by law in the distribution of **personal estate left by persons dying intestate.**"

Plaintiff in error also suggests that an assessment of damages on the basis of the loss suffered by beneficiaries "operates more equitably in practice than an assessment based upon loss to deceased's estate, because it compensates those upon whom the real burden of the wrong falls." (Br. 26.)

This plea in behalf of appellant in actions for injuries resulting in death accords rather poorly with

the theory that there should be no damages recoverable for killing one who leaves no dependants or next of kin. Appellant argues that although the Arizona statute of 1901, substituted for the former statutes of 1887, omitted the words "for the exclusive benefit of the widow and next of kin of such deceased person," this court should read this language into the later statute, and should likewise read into the later statute the former provision that damages should be assessed "with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person" (Br. 15, 16). In other words, it is argued that this court should overrule the lower court and hold that the act of the legislature in omitting this language was meaningless.

This argument does not commend itself to our reason or judgment, nor do we think it will appeal to this court. In the words of the court in Matthews v. Warner, 29 Gratt. (Va.) 570, directly in point:

> "It is impossible to conceive that the omission of such language and the adoption of other terms meaning the very reverse, could have been accidental."

Moreover, appellant's contention that we should have alleged and proven the existence of beneficiaries must appear quite technical and insubstantial in view of the record showing that this action was originally brought by decedent's widow acting as his administratrix (Br. 2); that the complaint alleges that deceased left "surviving him as sole heirs at law one son, George E. Sanders, one daughter, Ida C. Osgood and his widow, the plaintiff" (R.2-5) and that his son, George E. Sanders, testified on the trial (R. 37). Appellant concedes all this (Br. 34), thereby completely demolishing its first contention now under consideration.

Appellant concedes the Arizona statute was adopted from Wyoming and has not received judicial

interpretation in Wyoming, or anywhere else, in accordance with plaintiff's contention (Br. 18, 19). Under an elementary rule, therefore, the courts of Arizona were left free to place their own construction upon it. The conclusion deliberately reached in the Wilson case and subsequently re-affirmed in the De-Amado case and the case at bar is obviously sound. It is entirely supported by the citations in the Wilson decision (10 Ariz. 172) and by many other authorities construing similar statutes wherein the "pecuniary standard" for which plaintiff contends is rejected.

Railway Co. v. Hawkins, 174 Fed., 597.

Turner v. Railroad Co., 40 W. Va. 675;

Mattthews v. Warner, 29 Gratt (Va.) 570.

Plaintiff in error concedes that the West Virginia statute "is substantially the same as the Arizona Act of 1901" (Br. 24), and that the rule of damages in West Virginia "measures the recovery by the loss sustained by a deceased's estate;" but argues that the mere fact that the West Virginia courts have construed this statute in accordance with the decision in the Wilson case does not in any degree support the conclusion in the Wilson case (Br. 25).

Moreover, it appears that the rule laid down in the Wilson case has received the approval of the First Legislature of the State of Arizona, which, by section 6 of the new Employers' Liability Act (Chapter 89, Laws of First Session) provides that where the deceased left no surviving widow, husband, children, parents, or dependent next of kin, damages should be recoverable by his personal representative "for the benefit of the estate of the deceased."

We submit, therefore, that the rule announced by the Supreme Court of Arizona in the Wilson case and adhered to at all times since, and in the case at bar, should not now be disturbed by this court.

II

THE ALLEGED ERROR IN INSTRUCTIONS NUMBERED 11 AND 13.

Having instructed the jury that it might award "such damages as you deem fair and just, **such as will fairly compensate the estate of the** deceased for the loss sustained by reason of the death of the deceased" (Instruction 11, R. **187**), the court proceeded to tell the jury by instruction 13 (**R. 188**) "that it is not necessary on the part of plaintiff to show the precise money value of the life of the deceased, or the exact amount of damages suffered by the beneficiaries in order to sustain a recovery for substantial damages."

Plaintiff in error finds these instructions unobjectionable for the most part, but contends that when the court told the jury it was unnecessary to prove the exact amount of damages suffered by the beneficiaries in order to support a substantitl recovery (an entirely correct statement of the rule in the Wilson case) it impliedly instructed

> "That the plaintiff is entitled to substantial damages if he has proved by a fair preponderance of the evidence ***** the approximate amount of damages suffered by the beneficiaries" (Br. 31).

This astonishing contention is put forward in spite of the fact that again in instruction 14 (R. 188) the court specifically restricted defendant's liability to such damages "as the estate has suffered." With great respect for the able counsel for plaintiff in error, we suggest this contention does greater credit to their zeal and imagination than to their judgment. They claim that while the court correctly stated the law as laid down in the Wilson case, it **impliedly** told the jury by instruction 11 "not to consider certain elements which in instruction 13 they were **impliedly** charged constituted the measure of plaintiff's recov-

ery" (Br. 41). We submit this is too far-fetched. As pointed out by the Supreme Court of Arizona in its opinion in this case:

> "This action was tried throughout upon the theory that the damages to be awarded, if any, were such as were suffered by the estate of the deceased. There was no testimony concerning the existence of anyone dependent upon Sanders, nor that anyone had suffered pecuniary injury by reason of his death. The jury was plainly instructed just prior to the giving of the instruction complained of, that the damages to be awarded were those suffered by the estate, and in the instruction next following were again so charged. We are unable to perceive that the term complained of in the connection in which it was employed, and under the circumstances appearing from the record, could have confused or misled the jury" (13 Ariz. 85, 86).

III

ALLEGED ERROR IN PERMITTING RECOVERY WITHOUT PROOF THAT DECEASED ACCUMULATED AN ESTATE OR THE HABIT OF FRUGALITY.

The gist of plaintiff's contention under this head is that defendant in error could not recover substantial damages in the absence of

> "Evidence of deceased's accumulations as a basis for calculation of his probable accumulations during the remainder of his life expectancy" (Br. 42).

In other words, appellant asserts that unless deceased had accumulated an estate when he died his estate could not have been damaged by his death. It is conceded that the inventory of deceased's estate, certified by the Probate Court, was offered in evi-

dence but excluded upon objection of plaintiff in error, (R. 90). Such evidence has been admitted in a similar case for similar purpose. Yergy v. Helena Light, etc., Co., 102 Pac. 320, (Wash., '09); Par. 2541 Rev. Stat. Ariz., 1901. Also, that deceased had about $1000 coming to him from his employer when he died. (R. 99). But it is argued that he does not appear to have saved this $1,000. His expectancy of life was ~~by the lower court (13 Ariz. 86) and shown by the~~ 12.86 years at the time of his death, (R. 77), as found by the lower court (13 Ariz. 86) and shown by the record, (R. 99, 101, 196)—

> "The deceased was sixty-two years of age at the time of his death. He was by professsion a mining engineer, and there was testimony tending to show that prior to receiving the injuries which resulted in his death he was in robust health; that he was, and for sometime had been in the employment of a mining company, at a salary of one hundred dollars per month, and in addition was furnished a house and provisions for himself and wife."

He was receiving a soldier's pension of $6.00 per month, (R. 88), was sober and industrious, (R. 98, 105). All of this, however, avails nothing under appellant's theory, unless he had the habit of saving and had actually accumulated an estate when he died. Unless one has such a habit and has accumulated an estate he may be killed with impunity, so far as civil liability is concerned. It should be noted that this contention is merely a collateral offshoot of appellant's complaint concerning instruction numbered 12 given by the trial court, quoted by plaintiff in error (Br. 53). It is conceded that plaintiff in error did not upon the trial question the sufficiency of the evidence in this respect by motion for directed verdict (Br. 45).

Looking to the assignment of errors and to the statement of appellant's third contention(Br. 5, 41)

one would naturally understand that the lower court held,

> "That plaintiff was entitled to recover substantial damages for the benefit of the estate of the deceased without evidence showing or tending to show that deceased had ever saved or would have saved any portion of his earnings."

Doubtless the trial court and the Territorial Supreme Court would have so held if the question had been presented, but it does not appear that it ever was so presented. The two opinions of the latter court contain no reference to the matter. The language quoted by plaintiff in error as above set out does not appear in either of these opinions, nor in any utterance of the trial court shown by the record. This contention on the part of plaintiff in error merely represents a broadening of its contention in the Supreme Court of the Territory that the trial court erred in instruction number twelve (12), in failing to specify the various habits of deceased which were entitled to consideration in fixing the amount of damages. But assuming that this contention is now entitled to consideration, we confidently challenge its correctness. If we concede, in the language of the Supreme Court of California in Burke v. Arcata R. R. Co. 125 Cal., 364; 57 Pac., 1065, that "the majority of men die without much property," we are still unable to concede appellant's conclusion from this premise that the majority of men may be killed without resulting civil liability. In the Wilson case, 10 Arizona, 162, 172, the court said,

> "The evidence shows that the deceased was a mining engineer, a man 27 years old, sober, industrious and in good health; that he was earning one hundred dollars per month. The statute provides that the jury shall give such damages as they deem fair and just, not to exceed five thousand dollars. Where there

> are no fixed rules to ascertain the amount of damages the amount must be left to the sound sense and good judgment of the jury upon all the circumstances of the case, and such verdict should not be set aside unless it appears that the jury acted under some bias or prejudice, or under some improper influence."

Although no evidence of accumulations or of frugal habit upon the part of deceased was shown, the verdict was sustained.

Similarly, in the case of DeAmado v. Friedman, 11 Ariz., 56, it appeared that deceased was a strong, healthy, intelligent boy aged four years and four months. Upon this evidence a verdict of $4800.00 in favor of his estate was upheld. It did not appear that the deceased ever had earned or had saved anything, but upon this evidence it was held proper to instruct the jury that they might form an estimate "of the amount which the child would have saved from his earnings between the time when he attained the age of twenty-one years and the date which he might reasonably be expected to live."

In the case of Perham v. Portland etc. Co., 33 Ore., 451; 53 Pac., 14, cited and quoted by plaintiff in error (Br. 45, 46), the court said:

> "The allegations of the complaint and of proof were confined to the earning capacity, habits and probable length of life of deceased, and no instructions were given under which the jury could have understood that they had a right to consider any other matters in arriving at the amount of the verdict. By the instructions they were told in effect in assessing damages, if they found in favor of the plaintiff, to consider the earning capacity, habits and probable length of life of the deceased, and thus determine what would probably have been his accumulations if he

had lived the ordinary course of his life, and no question is made as to the soundness of this rule."

In Holmes v. Oregon etc. Ry. Co., 5 Fed., 523, cited by plaintiff in error (Br. 46) there was no showing either of accumulations or of disposition to save, but a judgment of $1000.00 was considered proper on the theory that deceased's net earnings were $100 per year.

In the case of Howard v. Canal Co., 40 Fed., 195, cited by plaintiff in error (Br. 46) nothing appeared as to the earnings of deceased, either gross or net, his habits of life, business experience or training or any probability that he might have accumulated property had he lived out his expectancy of life. The case was determined under a distinctly **compensatory** statute and in no way analagous to the case at bar.

In the case of Ladd v. Foster, 31 Fed., 827, cited by plaintiff in error (Br. 46), upon a showing that deceased was a worthless person, having no faculty or disposition to save or accumulate, and unable to earn any net income, a recovery of substantial damages was upheld. The circumstances of that case compared with those presented here, deprive it of any force whatever; all of which is equally true of the case of Holland v. Brown, 35 Fed., 43, cited by plaintiff in error (Br. 46) and of Serersen v. Northern Pacific Co., 45 Fed., 407.

In the case of Florida Central etc. R. Co. v. Sullivan, 120 Fed., 799, a judgment for plaintiff was upheld, and an instruction approved to the effect that the jury "were to determine from their own best, honest, and enlightened judgment from the testimony before them, of the age, character and health of the deceased, the period of his natural expectancy of life at the time immediately preceding his death and estimate the amount of the net earnings and accumulations he would reasonably have acquired during the period of

such expectancy, and then find the cash value of this amount at the time of the trial according to well recognized rules, and for this present cash value of the estimated reasonable net earnings and acquisitions of the deceased, find their verdict in favor of the plaintiff."

It thus appears that in the latter case the element of accumulations or of disposition or ability to save were not covered by the evidence.

In Jackson Electric Co. v. Bowden, 45 Sou., 755; 54 Fla., 451, the rule is laid down that from evidence of the character presented in the case at bar, the jury may properly estimate the probable future accumulations of the deceased had he been permitted to live out his expectancy, the court saying:

> "If the evidence shows the decedent's health, habits, or other conditions of life to be such that he had no reasonable future expectations of an estate, the recovery would of course be merely nominal."

It is thus apparent that appellant's citations do not support its position, but a wealth of authority supports the sufficiency of the evidence in the case at bar.

Railway Co. v. Cutter, 19. Kans., 83;

Railway Co. v. Hawkins, 174 Fed., 597;

Kelly v Railroad Co., 58 W. Va., 216; 52 S. E. 520;

Turner v. Railroad Co., 40 W. Va., 675;

Matthews v. Warner, 29 Gratt. (Va.) 570;

Bauer v. Richter, 103 Wis., 412; 79 N. W. 404.

Butte Elec. Ry. Co. v. Jones, 164 Fed., 308.

In the case of Railway Co. v. Cutter, 19 Kans., 83, the late Mr. Justice Brewer of this court, then of the

Supreme Court of Kansas, used the following language:

> "It is safe to say that no rule has yet been laid down of definite and precise statement, and applicable to all cases. That the purpose of the statute was to give to the survivors compensation for the value of the life taken away may be conceded; and therefore all the elements which go to make that life valuable, are proper matters of consideration; and matters which do not affect its value to the survivors, such as the pain and suffering endured by the deceased, the grief and sorrow of the survivors, are not to be considered. But how shall the value of a man's life be determined? By the needs of the survivors? Where the deceased leaves a family of small children, should the recovery be greater than where he leaves none? That logically would exclude all recovery where the deceased left no one dependent upon him. By the probable earnings of the deceased? That would often furnish the most inadequate compensation in the most deserving of all cases, as, where a wife and mother is the party killed. By the present value of the probable net accumulations of the deceased, considering his present business and expectations of life? That would be open to objections of the same character as the last, only of a far more serious nature. In the very nature of things it seems to us an exact and uniform rule for measuring the value of the life taken away to the survivors, is impossible. The elements which go to make up the value are personal to each case. All that can well be done is, to say that the jury may take into consideration all the matters which go to make the life taken away of pecuniary value to the survivors, and, limited by the amount named in the statute, award compensation therefor. To go beyond

this, and lay down an arbitrary rule for valuing the life of the deceased, a rule applicable to all cases alike, however, satisfactory it might be because of its uniformity, would in many instances operate to defeat the accomplishment of the wholesome purpose sought by this act."

The cases above cited amply establish the rule that the probability of future accumulations may be inferred from the ability of deceased to earn more than his expenses.

In the case of Butte Elec. Ry. Co. v. Jones, 164 Fed. 308, it is pointed out that the failure of deceased to save money was not conclusive that she might not have saved money later, it appearing that her earning capacity was good and that she was industrious and of excellent character.

It will be noted from the record in this case that plaintiff in error made no attempt upon the trial to question the amount of damages recoverable. It would have been entirely competent for it to have introduced evidence in reduction of damages or by way of showing that no damages had been suffered.

Atrops v. Costelio (Wash. 1894) 35 Pac., 620;

8 Wash. 149;

Standlee v. St. Louis etc. Ry. Co., 60. S. W. 781; 25 Texas Civ. App. 340;

Hesse v. Meriden etc. Co. 54 Atl., (Conn. '03) 299; 75 Conn., 571.

Upon the foregoing, we confidently submit that the evidence in this case amply supports the verdict and judgment, and indeed would support a much larger verdict and judgment if such had been permitted by the statutes of Arizona.

IV

THE ALLEGED ERROR IN INSTRUCTION NUMBER TWELVE.

The entire correctness of this instruction (R.187, 188) is established by the authorities cited above under subdivision III of this brief. The instruction is unusually full, clear and complete. It is not claimed that it misstates the law in any respect, but it is urged that it directs the jury to find what deceased "would have earned" had he lived out his expectancy (Br. 54). Since the instruction contains no such direction this criticism may be ignored.

In the lower court it will be noted that plaintiff in error attacked this instruction because while it permitted the jury to consider the "habits" of the deceased, it did not specify what habits were entitled to consideration (13 Ariz. 279). It is now claimed that "the failure of the court to charge that deceased's habits of thrift and economy were the gauge of plaintiff's recovery was consequently not an omissive error but an error of positive misdirection." (Br. 61.) But all of this is amply answered by the lower court (13 Ariz., 279). In any view the instruction was correct as far as it went. The jury was entitled to consider every element mentioned in the instruction. If it might have been improved by greater particularity, plaintiff in error should have requested an instruction fully covering the subject in accordance with its view of the law. Having failed to do so it may not now complain.

Backus v. Fort Street Union Depot, 169 U. S., 557; 42 L. Ed. 853.

Texas etc. R. Co. v. Volk, 151 U. S. 73; 38 L. Ed. 78;

Isaacs v. United States, 159 U. S. 487; 40 L Ed. 229.

We particularly call this court's attention to the Backus case, above cited, (169 U. S. 557). It is directly in point and controlling. The rule there announced is followed under like circumstances in many cases, of which we cite the following:

Kansas City Southern Ry. Co. v. Henrie (Ark. '08), 112 S. W., 967.

Galveston Oil Co. v. Malin, 60 Tex., 645;

Warren etc. R. Co. v. Waldrop (Ark. '09) 123 S. W. 792;

Sharon v. Winnebago Furniture Mfg. Co. (Wis. '10) 124 N. W., 299;

The above cases have particular reference to instructions concerning measure of damages and establish that an instruction which is only defective for nondirection and not for misdirection, which properly mentions some of the elements to be considered, but omits others which might properly be mentioned, is not ground for reversal. The refusal of a proper instruction covering omitted elements requested by plaintiff in error might have presented a different question, although we cannot conceive upon the evidence here presented, and in the absence of contest or room for contest as to the liability of plaintiff in error for the death of the deceased, any error in instruction upon the measure of damages would require a reversal of this judgment.

Appellant argues that it had no opportunity to request an instruction in accordance with its views of the law (Br. 68, 69). Doubtless this court will be guided by the Supreme Court of Arizona as to this question purely of local practice, and will assume from its decision in this case (13 Ariz. 279) that plaintiff had an opportunity to request the desired instruction. Such an opportunity is uniformly accorded in Arizona before the court delivers its charge. Any lawyer sufficiently interested may always, and does know in ad-

vance just what the court's charge will be. Even if it were not, plaintiff in error having failed to exercise its statutory right (Par. 1409 R. S. Arizona, 1901) to request instructions, waived its right to object to non-direction, as it now seeks to do.

In International & G. W. Ry. Co. v. McVey, 99 Tex., 28; 87 S. W. 328, cited by plaintiff in error (Br. 64) the court was confronted by

> " a verdict seemingly excessive in amount, and certainly, under all the circumstances of the case, unprecedentedly large."

In Ward v. Cochran, 150 U. S., 597; 37 L. Ed. 1195, also cited by plaintiff in error (Br. 63) it is pointed out that,

> "it seems evident that this action of the court misguided the jury and led them to overlook essential questions involved in the issue they were trying."

In both cases the discovered error affirmatively appeared to have prejudiced appellant. Assuming that the instruction now complained of was erroneous, mere technical error would not justify a reversal. Prejudice to plaintiff in error must appear. This prejudice could only arise through an excessive allowance of damages. The recovery here is unduly small in view of the evidence. The net earnings and pension of deceased being $106 per month would amount to $18,518.40 had he lived out his expectancy of life, at 12.86 years. The present worth of that sum at the time of trial was $12,595.45. Except for the statutory limitation, a verdict for the latter amount would have been sustained by the evidence. Therefore, no possible prejudice to plaintiff in error could have accrued from the instruction complained of, had it been erroneous. Assuming that plaintiff in error was responsible for decedent's death, the result of the trial would have been the same regardless of this instruction. Therefore, this court should not reverse this judgment.

Decatur Bank v. St. Louis Bank, 21 Wall. 294; 22 Law Ed. 560.

V

THE ALLEGED ERROR IN PERMITTING HYPOTHECAL QUESTIONS NOS. 11 AND 12 PROPOUNDED TO DRS. PLATH AND PALMER TO BE ANSWERED.

The record does disclose, as stated at page 76 of appellant's brief, that the Supreme Court of Arizona did sustain the rulings of the trial court in permitting answers to these questions "over the objections of counsel for the defendant," and would not under its rules scrutinize the REPORTER'S TRANSCRIPT to see what the specific objections interposed were; and that even conceding that defendant's brief set out the grounds of objection as made, still the ruling of the trial court was correct.

The only inquiry, therefore, upon which this court will enter is, whether, on the record made in the lower reviewing court on which the case was submitted, error was committed.

It is not contended by appellant that the lower court was mistaken in its statement and opinion in holding that as the record stood before it, as made up by appellant in the "Abstract of Record," the objections to these questions were general ones; that the only objections to these questions were that they were received in evidence "over the objections of counsel for the defendant."

The complaint of appellant is that the court below refused to examine the reporter's transcript for the purpose of "discovering the specific objections made in the trial court;" that in view of Laws 1907, p. 125, the reporter's transcript is made part of the record in the case, and the further fact that the lower court on

previous occasions, in its reviews on appeals, had been in the habit of referring to this transcript. It is insisted that Rule 1, Sub. VI of the lower court is in violation of the act 1907, and that the court's refusal to examine the reporter's transcript was in violation of that act.

Counsel for appellant seem to be laboring under the belief that the "Basket appeal" laws of Revised Statutes of 1901, Arizona, are still in force. The two cases cited at page 77 of their brief went up under the basket appeal provisions, and what is there said in considering the reporter's transcript has no force under the statute now under consideration. The record discloses that the trial of this case was concluded in the trial court on the 28th May, 1908, and did not reach the lower reviewing court until March, 1909.

Counsel have, doubtless inadvertently, overlooked that provision of the 1907 act amending paragraph 1586 of the Civil Code of 1901, found at the foot of page 130, Laws 1907, as follows:

> Sec. 377. At a time not later than thirty days next after filing the record in the Supreme Court the appellant or plaintiff in error shall file six copies of his brief and argument in the Supreme Court. This brief and argument must plainly state the errors complained of by him and refer to the page or pages of the record **or of an abstract thereof if one be filed in accordance with any rule of the Supreme Court, wherein the error is alleged to exist.** It shall be printed or typewritten, **and shall conform to such requirements as the Supreme Court may fix by rule.** * * * The italicised words were not contained in the 1901 laws.

"This (appellant's) brief and argument must plainly state the errors complained of and refer to page or pages" of the record or an abstract thereof

if one is filed. As before pointed out, in the opinion of the lower court and the brief of appellant, there was an abstract of the record prepared and filed in the lower court, by appellant in accordance with the rule complained of. The abstract of record in the lower court, page 59, folio, 176, reads:

> Thereupon the Court admitted in evidence over the objections of counsel for the defendant interrogatories eleven and twelve contained in the deposition of the witness O. E. Plath and the answers of the witness thereto (76 and 158) and to the ruling of the court admitting such interrogatories and the answers thereto defendant duly excepted (19 and 160), the interrogatories and answers forming the basis of such objections being as follows:

The figures in parentheses indicating the pages of the reporter's transcript.

The abstract of record, p. 65, folio 194, shows the precise record on these questions when submitted to Dr. Palmer as when the deposition of Dr. Plath was being read, except in the use of the name of Dr. Palmer in the place of Dr. Plath, and a change in the figures in parentheses respectively as follows: (80 and 161) and (19 and 161).

Counsel for appellant made their assignments of error in the lower court as required by rule, in their brief. Assignment II reads:

> That the Court erred in admitting, over the defendant's objections, the hypothecal questions contained in the depositions of Dr. O. E. Plath (176-186) and the witness' answers thereto, for the reason that such hypothetical questions were based upon a wrongful hypothesis and did not embrace all of the material and undisputed facts testified to by other witnesses for plaintiff, and further, that

> such questions assumed facts to be true which had not been testified to by any witness at the trial of the cause.

Assignment numbered III is identical with above with the exception that the name of Dr. E. Payne Palmer appears in the place of Dr. Plath and the figures in parenthesis are 194 instead of 176-186 as in the previous assignment.

The opening of appellant's brief in the lower court has this note preceding the "Statement of the case:"

> "(Note—Figures in parentheses ( ) throughout this brief refer to marginal folio numbers in our Abstract of the Record.)"

Since admission to statehood the Supreme Court of Arizona has adhered to the rule laid down in the case under consideration, that it will not go outside of the abstract of record and that such abstracts must be prepared and filed according to the rule.

In an opinion by the Chief Justice of Arizona, in Miami Copper Co. v. Strohl, 130 Pac. Rep. 605, 607-8, Advance sheet March 31, 1913, we find this language:

> The rules of this court, in substance, provide that all assignments of error must distinctly specify each ground of error relied upon and the particular ruling complained of. If the assignment of error be that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered distinct and specific by this court unless each ground is separately and distinctly stated in the assignments of error. * * *
>
> The object sought by the statute and the rules is to clearly apprise the appellate court and the opposite party of the specific error of which complaint is made.

See also, Vol. 132 Pac. Rep., Adv. sheet July 21, 1913, p. 1137—Thomas v. Speese.

The use of page and folio numbers in an abstract of record referring to the stenographer's minutes in the trial court is for the sole purpose of affording the court and opposing counsel means of corroborating recitals or quotations made use of in the abstract of record, and not for the purpose of enlarging such recitals and quotations.

Counsel have caused to be printed large portions of the reporter's transcript in the Transcript of Record in this court that did not appear in the printed abstract of record prepared by them in the lower court, and now ask this court to consider assignments of alleged error not presented in the record to the lower court, and which if allowed, would amount to a hearing **de novo** upon objections made in the trial court and not presented to the Supreme Court from which appeal is taken. This is the issue involved in assignments VI, VII and VIII in this court. None of the specific objections here contended for to questions 11 and 12 were presented in the lower court, and are now presented for the first time. They were not presented to the lower court in a manner they could be heard. We submit this court will not now interfere with the rulings of the lower court in its oft repeated holding that under its rules and the laws of the now state it will not go back and inspect the reporter's transcript to determine what objections have been made and the rulings thereon, and holding to the law and rules in conformity thereto that counsel must be confined to the abstract of record as made by them. The inquiry in this court will be limited to the matters presented and considered by the lower court.

Montana R. Co. v. Warren, 137 U. S. 348.

Robinson & Co. v. Belt, 187 U. S. 41, 50.

Hegeman v. Springer, 189 U. S. 505.

But suppose the Supreme Court of Arizona had proceeded to consider the specific objections to the hypothecal question pointed out in appellant's brief in the lower court, following a sub-heading "Analysis of the Hypothecal Question" under assignments Nos. 2 and 3 of the brief of the appellant where only three specific objections were pointed out and argued, as follows:

First: "THAT THERE IS NO TESTIMONY SHOWING, OR TENDING TO SHOW THAT DECEASED WAS 'A MAN WHO FOR MANY YEARS PRIOR AND UP TO THE 20TH OF MARCH, 1902, HAD ENGAGED IN MANUAL LABOR OF VARIOUS KINDS AND ALL OF WHICH LABOR AND DUTIES HE PERFORMED WITHOUT APPARENT FATIGUE.'"

Second: "THAT THERE IS NO TESTIMONY SHOWING OR TENDING TO SHOW THAT DECEASED FELL 'UPON HIS BACK AND THE OTHER MAN FALLING UPON HIM.'"

Third: "THAT THERE IS NO EVIDENCE SHOWING OR TENDING TO SHOW REGARDING THE INJURIES TO THE DECEASED 'THAT THE BREAST OVER THE HEART IS BRUISED AND DISCOLORED, WHICH CONTINUED LONG AFTER DISCOLORATIONS FROM BRUISES ON OTHER PARTS OF THE BODY HAD DISAPPEARED, HE COMPLAINED OF INTERNAL PAIN AT THE WAIST LINE AT THE SIDE OF THE NAVEL.'"

The foregoing three specifications were, therefore, the only specific objections pointed out in the brief of the appellant in the Supreme Court of Arizona. Certainly this court will not now, for the first time undertake to consider objections that were not presented to the lower court on appeal.

Now, as to the first foregoing specification, that deceased engaged for many years in manual labor of various kinds and which he performed without ap-

parent fatigue. De Massey, who was working under the deceased at the time of the injury, had known deceased 10 to 15 years, as to his general health and physical endurance (R. 30-34), and this witness described the character of labor performed by deceased, and all of which he did without apparent fatigue (R. 31-32). To the same effect is the evidence of George E. Sanders, for more than 5 years prior to the accident (R. 38-39). The witness, McNeil became acquainted with deceased in 1898 (R. 40) and prior to the accident he performed the heaviest kind of labor "without showing any fatigue" (R. 40-41). The witness, Gibson, knew deceased since 1898 and worked under him prior to the accident. Deceased performed the heaviest kind of labor "and he did not seem a bit fatigued, he was able to go when I could not." (R.43-44.) The witness Kinsley, became acquainted with the deceased in 1900, who "seemed very rugged and showed no signs of fatigue." (R. 47.) To the same effect is the evidence of the witness, McKee. (R. 58.)

As to the second specification, that there is no evidence tending to show that deceased fell upon his back and another man fell upon him. Appellant has pointed out in part only the testimony of the witness, George E. Sanders, in this respect wherein witness expressed himself "I think father falling under." In answer to the next two interrogatories, 16 and 17 (R. 37-38), the witness stated "after turning a somersault he landed on his back with his head nearest the track * * * and landed on my father; my father being on the front end was first thrown and landed first, Mr. McKee immediately following."

As to the third specification of injuries on the breast and discolorations continuing after discolorations had disappeared from other parts of the body and complaints of internal pains at the waist line, we challenge the attention of the court as follows: The testimony shows that deceased stated that he was hurt on the hip "and in the chest. He was black and blue

on the chest just after the accident * * * and next day complained of pain in the chest" (R. 38; see also R. 57, 60); and in April when he came to the office of Dr. Ward he was "suffering from extreme pain in the chest and had some discoloration on his shoulder." (R. 79. See also Gibson's testimony, R. 44). "He complained of internal pain at the waist line at the side of the navel." Counsel have assumed that there is no evidence tending to prove this fact, as no reference is made to it in their discussion. When deceased applied to Dr. Foss for treatment he gave the doctor "a history of his case as connected with his illness and related the accident while riding upon a street car about March 20, 1902, and he **told me of the manner of the accident and the injuries received by him"** (R. 61-62). "It was further disclosed by the post mortem examination that the pancreas was adhered to the intestines" (R. 63, 69, 73). "The probable originating cause to which I would attribute the adhesion of the pancreas as disclosed by the post mortem examination, was the street car accident of which Sanders told me and the clinical evidence present in the case which led me to the conclusion as to the cause of such adhesion was the **persistent soreness in the hypochondriac region about the waist line following the accident."** (65-66.) Drs. Plath and Palmer testified that "The pancreas was enlarged at the caudal extremity and was adherent in its extremity to the intestines" (R. 69, 73). The court will take judicial notice that the pancreas and hypochondriac region are at the side of the navel.

The evidence, therefore, tends to establish every material fact complained of stated in the hypothetical question, save in one single unimportant feature. The evidence sustains the fact that the "breast over the heart is bruised and discolored" and we think that there is evidence on the part of Dr. Ward and others from which it may be legitimately inferred that the discoloration was present when deceased applied to Dr. Ward. However, that may be, it is an immaterial variation.

Under subdivision "B," beginning with page 80 of the appellant's brief, counsel have pointed out certain portions of the hypothetical questions which, it is argued, are not supported by evidence tending to prove the same. We do not understand on the record as made up in the Transcript of Record in this court why counsel have gone outside of any record of objections to these questions when propounded to Doctors Plath and Palmer. The record on those questions will be found on pages 119 and 122, when propounded to Dr. Plath and pages 165 to 167 when propounded to Dr. Palmer. It will be noted on page 165 Transcript of Record their objection is that there was no evidence tending to support the assumption that on the following day after arriving at the Vulture camp, following the accident in Phoenix, the deceased, after driving Mr. McKee to Wickenburg, took to his bed. This evidence is amply sustained by referring to the testimony of De Massey, in answer to interrogatory 11, page 32 of the record, and the evidence of Dr. Ward in answer to interrogatory 8, page 79 of the record. It will be further noted at page 166 of the record, that after some colloquy between court and counsel the court addressing defendant's counsel asked, "What other fact do you object to?" Whereupon counsel stated, "There is no testimony to show when deceased suffered from more severe palpitation than at first;" that there was no competent testimony of the physical condition. Dr. Slusher (R. 51) testified as to the condition of the heart when deceased applied to him; that he was suffering from a dilated heart; that as time went on the heart failed to respond to treatment. (R. 51-52.) Dr. Ward (R. 79-81) testified that deceased was suffering from dilation and had a frequent pulse. Dr. Foss made an examination for pension purposes in June, 1903, (R. 61-62) and found the patient suffering from dilation, the originating cause of which was the accident in March, 1902, and the deceased became his patient in January, 1904, and his condition grew worse. Evidence of other witnesses upon this point will be found at p. p. 31-34, 43-46, 47-49. So that the only objection

made to these questions, and of which there is any record in this court, which attempt to point out in any particular, any facts assumed not sustained by evidence, are the two instances above referred to.

It is asserted, at page 89 of counsel's brief, that the "plaintiff's case depends almost entirely on the answers of the physicians to the hypothetical questions." And at page 75 it is asserted that "these answers constitute the only testimony in the case tending directly to show that Mr. Sanders' death was the proximate result of injuries sustained in falling or being thrown from defendant's car." In answer thereto it may confidently be asserted, on the record as now made up in this court, that counsel are very much mixed in their assumptions. We have previously pointed out (R. 37-38) that deceased fell upon his back and that Mr. McKee, who was traveling with him, fell upon him; that the night of the accident the deceased "spat" considerable blood and complained of pain in the chest;" that he was "black and blue on the chest and on the hip;" that deceased complained of being "badly injured internally and was suffering continuous pain." Mr. McKee testified that deceased complained of great pain in his chest as well as that he was bruised and sore; that they were both sore and stiff and unable to get about the next day. The witness described the character of labor performed by deceased prior to the accident and his ability to perform labor, and that following the accident he was incapacitated for doing manual labor (R. 57-58). The witness McNeil, who had known deceased from 1898, saw the parties on their return from Phoenix after the accident on their arrival in Wickenburg. "Previous to the accident deceased was very strong and endured the heaviest labor and the most trying without showing fatigue; that prior to the accident he never knew of deceased being weak or exhausted although he had workd for him and had seen very much of him. He met deceased on the platform at the depot and he was holding his hand on one side of his breast, and stated to

witness the accident, that they had 'pretty nearly killed him on the street car at Phoenix.' He also complained of his hip and moved with apparent distress. He seemed to grow worse right along from the first. * * * Mr. Sanders grew worse after the accident. I noticed that he became more exhausted and weaker as time passed and his legs and feet were more swollen. I observed also that the palpitation of his heart became more severe as time passed. He seemed to be getting worse and worse from day to day. His injuries seemed to continually affect him from the first, only his strength was better in the beginning but gradually failed him and to my observation every week and month found him weaker and more exhausted than before." The deceased stopped with the witness frequently when at Wickenburg and the witness described his condition from time to time and the services witness rendered from time to time (R. 40-43). The witness Gibson became acquainted with deceased in 1898 and worked for and lived with him off and on for 4 years. He met the deceased on his return from Phoenix after the accident, at the depot in Wickenburg and was told by deceased that he was thrown "from a street car and very nearly killed and didn't think he would ever get over it;" that previous to this accident the "endurance of deceased was as good as that of any man;" that he had "never noticed fatigue any more than any man would show in natural health." The witness then proceeded to describe the character of labor and physical endurance required and performed by deceased about the mine. That after the accident he had "no use of one arm and shoulder and his heart beat so hard when he tried to do anything that he had to quit. I have seen him sit down and shake with the pulsations of his heart." This witness had seen deceased about the mine supporting himself on the fences when he "complained of being out of breath and of pain in his side, shoulder and heart." The witness being asked, interrogatory 15, if prior to the accident he had observed incidents such as he had testified to as to condition of deceased prior to the

accident and how soon after the accident he made the observations to which he testified and described, to which he answered, "No, sir, I have never known anything to be wrong with Mr. Sanders' health before the accident. I noticed shortly after the accident that he was failing and continued to grow worse clear on to the time of his death." And in answer to interrogatory 18 the witness testified that deceased "grew worse after the accident as time passed; I observed that he was very weak and short of breath and didn't eat anything to speak of and that he complained continually of his heart and shoulder hurting him." (R. 43-46). The witness Kinsley became acquainted with deceased in 1900 and knew him intimately ever since, living in the same camp much of the time. In answer to interrogatory 6 he described the character of labor required of deceased, all of which he performed and was and seemed "very rugged and showed no signs of fatigue" prior to the accident. He further described in answer to interrogatory 9 the activities of deceased prior to the accident and that "he stood it without any noticeable effort whatever." And in answer to interrogatory 10 testified, "Immediately following the accident it was impossible for deceased to perform work, as it exhausted him to walk around; saw parts of his body black and blue, showing that it must have been very sore." And in answer to interrogatory 15, "I never knew anything to be the matter with Mr. Sanders prior to the accident, except possibly a slight attack of biliousness; since the accident I have never known him to be well, he seemed to get a little worse every month." And in answer to interrogatory 19 the witness testified, "At first, after the accident, Mr. Sanders limped in walking and during spells afterwards, and seemed to be practically without the use of one arm" (R. 46-50).

When deceased applied to Dr. Ward in April following the accident "he was suffering from extreme pain in the chest and had some discolorations on his shoulder. He had difficulty in breathing and a stiff-

ness and soreness in the muscles, also his heart was enlarged or dilated * * * When he came to me he was suffering from heart trouble, enlargement or dilation of the heart and had a very frequent pulse and extreme pain in the region of the heart. * * * Prior to the accident I had not seen Mr. Sanders for two years and had not noticed any irregularity in the action of his heart. The cause of the irregularity at this time was dilation, which I have previously mentioned" (R. 79-81). Dr. Foss met deceased June 3, 1903, when as a member of the Medical Board he made an examination of deceased for increase of pension. He was suffering from dilation of the right heart. During this examination deceased related the accident in March, 1902, its manner and his physical condition following, and also his physical condition prior to the accident. From such personal examination and the statements given by deceased in answer to interrogatory 14, the Doctor testified that, "the probable originating cause of the dilation or lesion was an injury received in March, 1902, and at the time of such examination for increase of pension, he found a 'marked case of dilation, severe palpitation following slight exertion,'" this in answer to interrogatory 19. Witness made a post-mortem on the body of deceased, assisted by other doctors and in answer to interrogatories 23 and 24 he described the condition of the heart and organs. Among other things there was found a "scar and small bands, showing that nature had attempted to repair the injury," and that the "pancreas was adhered to the intestines." And in answer to interrogatory 26, based upon the post-mortem examination, he attributed the immediate cause of death to dilation of the heart. And in answer to interrogatory 32 the witness attributed the adhesion of the pancreas to the injury received in the street railway accident. Then in answer to cross-interrogatory 4 the post-mortem "indicated that the tricuspid valve of the heart had been ruptured;" and in answer to cross-interrogatory 6 the post-mortem did disclose a difference from one dilated from fatty degeneration without history **"in that there was a scar**

caused by traumatism or injury, causing lesion and indicated quite clearly that there had been injury." And in answer to cross-interrogatory 8 the witness stated that there **"was present on examination of the heart, evidence of an injury as a moving cause."** And in answer to cross-interrogatory 14 the witness testified, "there was no evidence of a rheumatic heart disclosed by the post-mortem examination and there was no other evidence found in the examination to indicate that the trouble indicated by this question had existed." Cross-interrogatory 17, whether deceased had diseased lungs, the witness answered: **"The post-mortem examination did not disclose diseased lungs,** there was a general edematous (dropsical) condition of the entire system which follows dilation" (R.60-68). In answer to interrogatories 7 and 8 Dr. Plath described the anatomical condition of the heart and pancreas as found by the post-mortem, and being asked, based upon this post-mortem examination to what he would attribute the immediate cause of death he testified in answer to interrogatory 9, "The immediate cause of death was acute dilation of the heart." On cross examination, interrogatory 4, the witness was asked if dilation or lesion of the heart, resulting from external injury or violence usually resulted quickly fatal. The answer was, "It does not. That would depend upon the extent of violence of the lesion, and upon the resisting and recuperative powers of the individual." And in answer to the next question, the witness testified, that the fact that the deceased lived 23 months after the injury did not suggest that the dilation was due to disease rather than to sudden external violence. And asked, if he had known of a case similar, of lesion produced by external violence other than by a perfratory wound, the witness answered, "I have in principle, a young man 20 years of age, not accustomed to severe exertion, had taken a 50 mile ride on a heavy bicycle. Soon after he was taken with difficulty in breathing, palpitation, bluing of the lips, a feeling of extreme discomfort, which persisted for a considerable time and from which he has not yet

fully recovered, after several years." (R. 69-72.) Dr. Palmer, who was present at the post-mortem, after describing the anatomical condition of the heart and pancreas and giving substantially the same answers as Dr. Plath, with the addition that the tricuspid valve "showed small bands extending from the flap to the inner wall of the heart," in answer to interrogatory 9 for his opinion as to the immediate cause of death, based upon the post-mortem, the witness answered, "Based upon the post-mortem examination I attribute the immediate cause of death to acute dilation of the right side of the heart." And in part answer to cross interrogatory 6 the witness testified, "There was present at the autopsy evidence of some violence to the heart, causing lesion. The fatty clots and condition evidently was provoked by the injury received, and followed as a result of the impaired condition of the heart after the injury." This witness also had personal observation of a man in apparently good health who had fallen from a loaded wagon to the sidewalk. "The diagnosis disclosed acute dilation of the right ventricle of the heart, sometimes termed lesion. The case passed from under my observation and I do not know how it finally terminated," (R. 73-76). The deceased became a patient of Dr. Slusher in December, 1902. He found the patient suffering from a dilated heart and which, after a time failed to respond to treatment and the patient grew worse as time passed. The witness was present at the examination in November, 1903, at the office of Dr. Foss, at the examination for an increase of pension. He again visited him at his home at the Vulture mine, at which time he made a careful examination and was impressed by the fact that less exertion affected him than when he first saw him, being unable to count the pulse at times. The patient was suffering with the same symptoms as formerly but in an aggravated form (R. 51-52).

It thus clearly appears, by competent and most convincing independent evidence, outside of the two hypothetical questions complained of, that the injury

received in the street railway accident was the originating cause of the condition of the heart and patient following the accident, and that death was directly due to the injuries received in the accident. There is, therefore, ample, indeed we may say most convincing evidence in the record of this case, outside of that suggested by the hypothetical questions complained of, that the death was the direct result of the injuries received. This being the case, any alleged error in permitting answers to these questions was wholly immaterial, since the jury would have been bound to reach the same conclusion regardless of the answers thereto.

While we do not believe the court will proceed to examine the various points of objection treated of under subdivision B beginning at page 80 of appellant's brief, for reasons heretofore pointed out by us, still since counsel have assumed to discuss these matters, we will give them a passing notice only. Counsel say (Br. 89):

> "The transcript of record shows that objections to the said improper question were duly and seasonably interposed. The question was first gone over in detail when the deposition of Dr. Foss was under consideration (R. 115-117), where defendant pointed out in detail matters covered by the question which were not included in the evidence but its objections were overruled (R.117)."

> The objections were renewed when the deposition of Dr. Plath was under consideration (R. 119), and the court hesitated and took the matter under consideration (R.119-120). When the matter was brought up again defendant renewed its objections (R. 165-167), but they were again overruled by the court (R. 166)."

The transcript of record (115-118) discloses the fact that interrogatory 29 propounded to Dr. Foss on objection of counsel for defendant was sustained, so that, as stated by the court (R. 117), when a question and answer have been stricken out they are out for all purposes; and, of course, it necessarily follows that the objections thereto, unless subsequently specifically renewed, would fall with the question and answer. And an examination of the transcript of record (165-167) when the hypothetical question was propounded in the deposition of Dr. Plath does not disclose that "The defendant renewed its objections." Intending thereby to convey the meaning that the objections made when the similar question was propounded to Dr. Foss were renewed. Earlier under this branch of the argument we pointed out the only two particulars wherein counsel asserted there was not evidence to sustain the assumption of fact, and have met that objection by pointing to the record wherein there was evidence to sustain facts assumed and to which objection was made. It will be noted (R. 165-166) that counsel designated one particular wherein it was claimed facts assumed were not supported by evidence, which the court overruled, and then addressing counsel for defendant the court asked, "What other fact do you object to?" Thereupon counsel stated:

> "There is no testimony to show when the deceased suffered from more severe palpitation than at first. There is no testimony to show by anyone competent to testify what the physical condition was."

This, then, is the whole record as to objections made by counsel relative to any specific fact assumed in the hypothetical question, which it was claimed was not sustained by the evidence. Certainly it cannot be successfully claimed at this time that counsel can now claim the benefit of any objection made to the similar question when propounded to Dr. Foss.

And if the question and answer when propounded to Dr. Foss went out of the record for all purposes, not to be again availed of by the plaintiff, by reference as ruled by the trial court, certainly the defendant may not now avail itself of the benefit of any objections then taken and not specifically renewed when the similar question was propounded to Drs. Plath and Palmer.

But adverting to alleged objections made when the similar question was propounded to Dr. Foss, and the complaint that there was no evidence that the water for domestic purposes was carried in "five-gallon pails." Doubtless the words quoted were used because of the common knowledge in the mining section of the country that the water pails used are five-gallon. Whether it was a three or five-gallon pail, or even a six or seven-gallon pail, is of little or no consequence in view of the prior rugged health of the deceased and the feats of strength which the record discloses he had engaged in during his lifetime.

Of the complaint, "And windlasses ore from shafts," counsel neglected to quote the answer of witness except that, "He was there windlassing," and complains that "nowhere is there any suggestion that he windlassed ore from the shafts." The record (R. 102) discloses the answer of the witness:

> "Yes, there was work going on on some shafts at one time there sometime in December, and he was there windlassing. That was assessment work on outside claims, he was there windlassing."

It is of little consequence whether the deceased was windlassing ore or something else, but we submit that it is very far-fetched to assume that the deceased was not windlassing ore.

It is next complained relative to the assumption of fact that the deceased performed many kinds of

manual labor without apparent fatigue, that the evidence covering such manual labor extended over "only a period of four years," while the question assumed a greater length of time. The witness DeMassey (R. 31), knew the deceased for "perhaps ten or fifteen years:"

> "I have known as to his general health for upwards of ten years. He was a man of great physical endurance" (R. 34).

In answer to interrogatory 24 (R. 39) the son of deceased testified as to the physical health and power of endurance of manual labor for "five or more years previous to this accident," and answered, "His health was always good. He was able to do any kind of work and did it when there was any occasion for it. I know this to be so, having done various things with him, and was with him a great deal of the time."

The next complaint is made that the evidence did not justify the statement that the deceased fell upon his back and another man fell upon him. Although counsel have pointed out sufficient evidence in the record tending to establish the fact they seem to have strangely dropped from the testimony of George E. Sanders, quoted by them (Br. 83-4), five words without indicating in any manner that such words had been omitted. The last sentence but one of the quotation instead of reading and concluding as counsel have it should read, "I saw Mr. McKee thrown from a sitting position beside my father, **and landed on my father.**" It is these last five italicised words that were strangely omitted by counsel, a bit of testimony that might well have been printed in the bold face type which counsel caused the word "think" to be printed in their brief—an act that does no credit to the practitioner before this court.

The next complaint (Br. 84) is of the assumption that the deceased next day after the accident was black and blue over the chest and hip, and was suffering from continuous pain and expressed fear of inter-

nal injury. Counsel content themselves with the mere statement that there was no testimony of any kind to sustain this statement. In their brief counsel have called attention to the testimony of Dr. Ward that when the deceased came to him professionally in April he was suffering from extreme pain in the chest and had some discoloration on the shoulder. We have before pointed out (R. 38) that the night of the injury he expressed fear of internal injury and that he was suffering continuous pain; that he was injured in the hip and chest and complained of pain in the chest and that he was black and blue on the chest and hip. The record further discloses (R. 48) that after deceased returned to camp parts of his body were black and blue and showed that it must have been very sore. There is other testimony tending in the same direction, but it is unnecessary to make extended reference.

Another point of objection appears at the bottom of page 84 of appellant's brief which counsel affirm is not in accord with the evidence as will appear from a quotation which follows from the evidence of Dr. Ward. We have covered this feature of the case fully earlier under this assignment, No. 5.

At page 85 of their brief counsel set out about two lines of testimony given by J. M. Jamison (R. 103) and then proceed to state, "Nowhere is there any suggestion that he spat blood or vomited clots of blood on the following day, and nowhere is there any suggestion that his chest was bruised and discolored on the following day." As to the latter part of the complaint of bruised chest and discoloration, we have pointed out previously in the record testimony in support thereof. But as to the statement that there is no evidence to support the statement that he spat or vomited blood the following day, we set out the answer of the witness in full (R. 103):

> "Later in the evening (of the accident) I went up to his room, as I did also to Mr. McKee's, and he made complaint. He then

described fully what happened, not so much had been said prior to that time. He made complaint of his left chest, soreness; his left arm was sore, and it was with difficulty that he moved it. He complained generally of being sore and knocked out. The next day I was at his room, he remained in all the next day. I was in his room during the day. I was in his room that night. That night he vomited some and he spat some blood and vomited up some clots of blood. That was the 21st, I think. I think they left for Wickenburg the next morning train."

There is, therefore, direct and positive testimony that he vomited clots of blood the following day.

The next complaint is made relative to the time when deceased returned to camp after driving McKee to Wickenburg (Br. 86), where it was stated that "he required assistance to help him from the conveyance to the house and immediately takes to his bed. He is suffering from pain about his heart, at the waist line and shoulder, and from suffocation. It is asserted that there is no evidence tending to support the statement of assistance from the conveyance to the house, and this immaterial statement may be admitted in the face of the well established fact that he immediately took to his bed and did not leave it until the 8th of April, and other testimony of the condition of deceased from the time of the accident down to the time of decease, and still it can be confidently said that had those words been omitted the result would have been the same. We have previously pointed out ample evidence tending to sustain the other portions of the statement complained of and will not re-state it here.

Complaint is finally made that there was no competent evidence as to the use of strychnine by the deceased. The only witness who named the drug was Mr. Jamison, and he testified that, "The patient car-

ried it with him and used it. I knew what it was because my wife uses it and has to use it all the time (R. 105; see also 51).

It therefore appears from the record before this court that every material fact assumed in the hypothetical question is supported by evidence. We challenge the attention of the court to the cast of Orient Ins. Co. v. Leonard (7 C. C. A.) 120 Fed., 808, 811, wherein we find this language:

> "Hypothetical questions were objected to on the ground that facts were included which were not conceded to be true nor established by the evidence. A hypothetical question may call for an opinion based on facts assumed. If the facts are not eventually proven, the weight of the answer is destroyed, but error cannot successfully be predicted on the court's permitting the question to be put."

It is sufficient if a hypothetical question is within the possible range or probable range of the evidence, without being based upon all the evidence given or upon a judicial summing up of the fair effect of that evidence.

Filer v. New York Central R. R. Co., 49 N. Y. 42;

Cole v. Fallbrook Coal Co., 150 N. Y. 59.

In Forsythe v. Doolittle, 120 U. S., 73; 30 L. Ed., 586, we find this language relative to hypothetical questions:

> "They embody with some fullness the matters supposed by the plaintiffs to have been established, and it was only upon that assumption that the opinions of the witnesses

> as to the value of the services rendered were given. If the assumption was erroneous, if the matters supposed to be established were not in the judgment of the jury, in truth established, the opinion went for nothing; and so the court instructed the jury."

In Rae v. Rae, 98 N. C., 566; 4 S. E. 526, the court said, concerning hypothetical questions:

> "But if there was some unproved matter inserted in the supposition, and there was error in allowing the response to be given, it is cured by what was said in the charge when an instruction **was asked and given** in these words."

There was no motion made to strike the answer to hypothetical questions, nor was there any request on the part of the defendant for an instruction relative to the weight to be given to a hypothetical question should the jury find that it was in any particular unsupported by evidence tending to establish the facts or any portion assumed, and in this connection we challenge the attention of the court to the language of Mr. Lawson quoted by appellant at pages 88-89 of its brief, viz., that the only effect of an improper assumption is that it goes to the weight and credibility to be accorded to the experts' answer.

Appellant now complains that experts were allowed to state their opinions as to "The probable originating cause of death" (Br. 79). It is not contended by appellant that this question was presented to or determined by the lower appellate court. As a matter of fact, it was not, and therefore for reasons earlier pointed out in our brief this court will not consider the question. It is contended that "This was the very issue to be determined by the jury and in effect made the witnesses members of the jury."

Should the court, however, entertain this question, we are undecided what portion of the record as made up in this court, appellant relies upon for its objection. If we refer to the record 116-17 when the similar question was propounded to Dr. Foss (which record we believe has no proper place before this court), we find this language bearing upon the question now under consideration:

> "And finally that the question asks for a conclusion as to the probable originating cause of the trouble and suffering for which the patient was treated, and does not ask the probable originating cause of the trouble from which the patient is alleged to have died."

In other words, on the trial they complained that we did not ask as to the originating cause of death, and now they complain that we did. But should we refer to the record in this court (165) when the similar question was propounded to Dr. Plath, we find this record:

> "By Mr. Burks: Now, the defendant objects to interrogatory XI propounded to Dr. Plath, upon the grounds and for the reasons that this hypothetical question assumes facts which were not in evidence and is not based upon all the facts in evidence. In other words, it is based upon a wrongful hypothesis and calls for an opinion by the witness on matters of fact which should be determined by the jury, and it amounts in substance to asking the witness to render the verdict which should be rendered by the jury in the case."

It will be observed therefore that this objection is general and does not point out the specific objection now urged. We repeat that this question was not presented to the lower court either by assignment of error

or in any discussion in appellant's brief. However, should the objection now urged be taken notice of we respectfully challenge the attention of the court that the objection is not well taken. Counsel have cited four cases (Br. 79) in support of their contention. The case of Briggs v. Minneapolis St. Ry. Co. (Minn.), 53 N. W. 1019, 1020, being the leading case.

An examination of the authorities so holding as contended for by appellant discloses the singular inconsistency of deciding that in a criminal case an expert may testify as to the probable cause of death, while in a civil case he may not so testify, reasoning that in a criminal case the cause of death may not be determinative of defendant's guilt. The absurdity of this is clear, since in a civil case, as in the case at bar, the cause of decedent's death is not determinative of the case. The determinative question is, Was death caused by the negligence of defendant? That question was in no manner put to the experts. It does not follow that defendant is liable merely because decedent's death was caused in the street car accident. Moreover, it appears that the answers of the experts were given as opinions only, and not as statements of fact; and did not, therefore, invade the province of the jury by attempting to determine any controlling fact in the case.

Earlier in this brief we have called the attention of the court to the fact that there is abundant testimony outside of the hypothetical question complained of to sustain the verdict of the jury, and that the alleged error is a harmless one since there is such abundant independent evidence. We find the case of Wells v. Swift & Co., by the Supreme Court of Kansas, 133 Pac., Rep. 732, found in Advance Sheet of August 18, 1913, the court held that it was harmless error to permit a witness to give his opinion as to the safety of a mechanism where there is sufficient other evidence on the same subject to support the verdict, and in the same advance sheet the Supreme Court of Colorado

in Heginbotham v. Webster, 133 Pac., 740, the court reiterated the doctrine that questions not brought to the attention of the court of appeals of that state by argument or otherwise should not be considered by the supreme court on appeal, and that whether the plaintiff in error is attempting by argument or otherwise to raise questions in the Supreme Court not presented to the court of appeals, should not be raised by a motion to strike a brief or furnish an additional abstract. The court say the proper way is to call the attention of the court in the brief of defendant in error to the fact that the plaintiff in error is attempting to raise such questions. In this respect in the case at bar counsel for appellee have taken the course indicated as the proper one by the Supreme Court of Colorado, and we challenge the attention of counsel for appellant in all respects to the correctness of our quotations and claims of the position of appellant in the lower court.

Against this and sustaining the form of question of this record we find numerous and better considered authorities. We find almost the identical form of question sustained in Denver and Rio Grande Ry. Co. v. Roller, 100 Fed., Rep. 738, 49 L. R. A., 77, 87, citing numerous authorities:

1 Wigmore on Ev., Section 672.

Manufacturers Accident Indem. Co. v. Dorgan, 58 Fed., 949.

Chicago v. Didier, 227 Ill., 571.

Union Traction Co. v. Roberts, 229 Ill. 481.

Shawnee Gas & Elec. Co. v. Hunt (Okla. 1912), 122 Pac. 673.

The latter case is so conclusive in its reasoning that we make the following quotation from page 675:

"It is further contended by defendant that the question is objectionable because it concluded by asking the witness what he would say was directly or indirectly the cause of the condition. **The ground of this objection is that it is calling for a conclusion of the witness, and that it usurps the functions of the jury.** This view is supported by numerous authorities. The views of those courts who upheld the contention is well illustrated by the case of Aetna Life Ins. Co. v. Bethel, 140 Ky. 609, 131 S. W. 523, where it was held improper to ask a physician whether in his opinion auto-intoxication was caused by a fall. The court said the witness should have been asked if in his opinion the fall would produce auto-intoxication. In one case it is said the distinction is clear to a legal mind. But the trouble is that the question is asked for the assistance of the jury, and the jury is not composed of men with legal minds. When the conditions are stated which exclude all other causes for auto-intoxication except a fall, what particular difference is there between the question, "Now, with all these other causes excluded, and the fall shown, would the fall produce auto-intoxication?" and the question, "With all these other causes excluded, and the fall shown, did the fall produce auto-intoxication?" The only logical deduction from the answer to the first question is the same as the answer to the second question. To quote from the opinion of Justice Mitchell in Donnelly v. St. Paul City R. Co., 70 Minn. 278, 73 N. W. 157: 'Neither do we appreciate the fine distinctions sometimes sought to be drawn between asking an expert whether, in his opinion, certain causes might produce certain results, and asking him whether, in his opinion, they did produce such results.'

"It is believed the better reason supports the view that an expert can state that in his opinion certain causes did produce certain results. After all, the jury is not compelled to follow his opinion. They may not believe his opinion the correct one. This view of the question is supported by Cooper v. St. Paul, 54 Minn. 379, 56 N. W. 42; Davey v. Janesville, 111 Wis. 628, 87 N. W. 813; Crouse v. Chicago & N. W. R. Co., 102 Wis. 197, 78 N. W. 446, 778; Selleck v. Janesville, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563, 69 Am. St. Rep. 906; Nebonne v. Concord Railroad, 68 N. H. 296, 44 Atl. 521; Gault v. Concord Railroad, 63 N. H. 356; Poole v. Dean, 152 Mass. 589, 26 N. E. 406; Snow v. Boston & Maine R. Co., 65 Me. 230; M. K. & T. Ry. Co. v. Criswell, 34 Tex. Civ App. 278, 78 S. W. 38."

In conclusion we believe that we are within the record of this case in confidently assuming that most of the complaints now made by appellant in this court will not be considered for the reason that the same were not presented to the lower court, and that even should this court consider alleged errors de novo there will be no reversible error found, and that the judgment of the lower court will be affirmed.

Respectfully submitted,

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